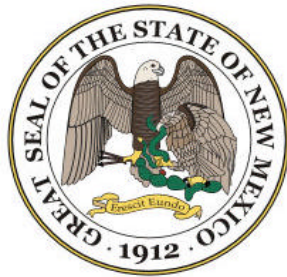


# **Report on Income Tax Withholding on Native American Veterans**



October 1, 2008

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## **Executive Summary**

SB 574, introduced by Senator John Pinto and passed in 2008, creates the Native American Veterans' Income Tax Settlement Fund from which the Secretary of the Department of Veterans Services is directed "to make settlement payments to Native American veterans who had state personal income taxes improperly withheld from their military pay."

The impetus for SB 574 is that New Mexico income tax has been withheld from Native Americans' military wages that are exempt from New Mexico income tax. This withholding began after July 1, 1977, the date the State of New Mexico first entered into a withholding agreement with the U.S. Department of the Treasury that covers the Department of Defense. Such withholding occurred because until recently there were no clear instructions available to Native Americans in the military describing how to avoid the withholding by stating the exemption on a Form W-4 or by other means. A Native American who did have withholding of New Mexico income taxes from their exempt military pay could have obtained a refund of those withheld taxes by filing a New Mexico income tax return within the prescribed three-year period. Withholding during 2004 and later years can therefore still be refunded through filing of a New Mexico income tax return.

Until settlement claims are filed, we will not know the precise number of Native American veterans who were residents of their tribal lands during their period of military service after July 1, 1977 and before 2004, how much was withheld from their exempt military pay, or how many subject to such withholding filed a New Mexico income tax return and received a refund of the withholding. Illustrative examples as well as the actual payments ordered in the case of Felipe vs. Taxation and Revenue Department indicate that the amount of withholding ranged from relatively small amounts in the early years of withholding to a few hundred dollars in recent years. We estimate that as many as 7,651 living Native American veterans may have had New Mexico income tax withheld between July 1, 1977 and 2003. Using a variety of data sources and alternative assumptions, we estimate that the total amount of this withholding was likely less than \$2 million.

We have developed a draft set of rules for administering the Native American Veterans' Income Tax Settlement Fund and for making payments from it. The guiding principle of these draft rules is that any settlement payments can and should be made in the fairest way possible. We plan to enter into a formal government-to-government consultation with tribes on these rules before they are finalized as a regulation. Once the rules are finalized, we plan to begin accepting claims for settlement payments. In addition, there are several issues related to the workings of the Fund that may need to be addressed in future legislation, including an appropriation to the Fund to cover the cost of making and administering payments.

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## Background

During the 2008 regular legislative session Senator John Pinto introduced SB 574, which was passed by the Legislature and signed into law by Governor Richardson.<sup>1</sup> SB 574 creates the Native American Veterans' Income Tax Settlement Fund from which the Secretary of the Department of Veterans Services is directed "to make settlement payments to Native American veterans who had state personal income taxes improperly withheld from their military pay." (Appendix A contains the full text of SB574.)

The impetus for SB 574 is that New Mexico income tax has been withheld from Native Americans' military wages that are exempt from New Mexico income tax. The exemption from New Mexico income tax is the result of two matters of law. The first is a 1973 decision of the U.S. Supreme Court that a state cannot impose its personal income tax on the income of Native Americans earned on their tribal land if they live on their tribal land.<sup>2</sup> The second is the provision of federal law<sup>3</sup> that members of the military do not change their place of residence for state tax purposes by virtue of their military service. Thus, Native Americans who resided on their tribal lands when they entered military service and did not change their residency while serving in the military are not subject to New Mexico income tax on their military pay.

Withholding of state income taxes by the federal agencies, including the Department of Defense, is governed by federal law.<sup>4,5</sup> That law was amended in 1976 to require the U.S. Department of Defense to withhold state income taxes from military pay once a state had entered into an agreement for such withholding with the U.S. Department of the Treasury. On July 1, 1977, the State of New Mexico first entered into an agreement with the U.S. Department of Treasury to withhold State personal income taxes from military pay.<sup>6</sup>

### State Income Tax Withholding

Generally, withholding for New Mexico income tax follows the rules for withholding of federal income tax, but using separate employer withholding tables. The amount of income tax withheld is determined by the amount of wages paid in the pay period, the length of the pay period, the employee's filing status (single or joint), and the number of withholding allowances declared by the employee on their "Employee's Withholding

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<sup>1</sup> SB574 is codified at NMSA 1978, § 7-2H-1 through § 7-2H-4.

<sup>2</sup> *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

<sup>3</sup> Section 571(a) of the Soldiers' and Sailors' Civil Relief Act, which has been in effect in substantially the same form since 1919. See also the November 22, 2000 Memorandum for the General Counsel, Department of Defense, "State Taxation of Income of Certain Native American Armed Forces Members" (Appendix B).

<sup>4</sup> 5 U.S.C. § 5517.

<sup>5</sup> Wage withholding for personal income tax purposes was adopted in New Mexico in 1961. See, Taxation and Revenue Department, *History of New Mexico's Taxes: 1909 to July 2005*.

<sup>6</sup> See Vol. 1, Part 3, Chapter 5000 of the Financial Manual of the U.S. Department of the Treasury, which includes a the listing of the states, municipalities, and counties that have entered into a withholding agreement and the date that the agreement became effective. The listing is contained in the appendices of the agreement after 215.13.

Allowance Certificate” (Form W-4; Appendix C contains the 2003 Form W-4). Employees file a Form W-4 with their employer when they begin employment, and may file an amended Form W-4 whenever their income tax situation changes (for example, if they get married or have a child). An employee indicates on Form W-4 the number of withholding allowances the employer takes into account in determining the amount of federal and state income taxes to withhold from the withholding tables.

Typically a taxpayer claims one withholding allowance for themselves, one for their spouse (if married), and one for each of their dependents. However, single taxpayers with only one job and married taxpayers with only one job and a non-working spouse claim an additional withholding allowance. Additional withholding allowances also may be claimed if, for example, the taxpayer itemizes deductions. Conversely, fewer withholding allowances may be claimed if, for example, the employee has a second job or non-wage income. An employee with no income tax liability in the current and prior year can indicate they are exempt from federal withholding on Form W-4, and can file a separate W-4 for state withholding purposes to indicate they are exempt from state income tax withholding.

Employers by law are required to withhold based on the W-4 filed by the employee and the prescribed withholding tables, and to remit withholding amounts to the government. If no W-4 is filed, the employer withholds at the rate for a single taxpayer with no withholding allowances.

## **Was New Mexico Income Tax Withheld from the Exempt Military Pay of Native American Veterans?**

Prior to July 1, 1977, to the best of our knowledge and verified by the Department of Defense, no New Mexico income tax was withheld from military pay. A letter, dated August 28, 2008, from Linda Etter, Assistant General Counsel, Military and Civilian Pay Law, Defense Finance and Accounting Center (Appendix D), provides more detail:

*“It is correct that DoD did not withhold any State income taxes from the pay of military members prior to July 1, 1977. The authority to deduct State income taxes from a member's pay is set forth in 5 U.S.C. 5517. This statute was amended in 1976 to authorize the withholding of State income taxes from the pay of a military member. See Pub. L. No. 94-455, section 1207 (1976). The amendment was effective with regard to wages withheld after the 120-day period after a State requested to enter into a withholding agreement with the Department of Treasury. See Pub. L. No. 94-455, section 1207(f) (1976). Based upon this authority, the earliest date of an agreement with the Department of Treasury is listed as July 1, 1977. See TFM, Vol. I, part 3, chapter 5000. Thus, prior to July 1, 1977, DoD did not have authority to withhold State income taxes from the pay of a military member.”*

After July 1, 1977, New Mexico income tax was withheld from the pay of some Native Americans who were domiciled on tribal lands during the period of their active military duty. Such Native Americans are exempt from state income tax on their military pay, and therefore should not have state income tax withheld from their military pay.

Filing of a separate Form W-4 for withholding of New Mexico income tax, indicating that military pay is exempt, would have insured that a Native American who was a resident of their tribal land had no New Mexico income tax withheld from their military pay.

However, until recently no clear instructions were provided to such individuals on how to avoid New Mexico income tax withholding.

New Mexico does not have a separate equivalent of Form W-4 for State withholding purposes, and before 2003 did not include in its withholding instructions to employers any specific information on how an employee should request a different level of State withholding allowances from the amount shown on the federal W-4.

It was not until July 2002 that the Department of Defense introduced a “Native American State Income Tax Withholding Exemption Certificate” (DD Form 2058-2; Appendix E) that Native American members of the military use to certify that they are exempt from state income tax withholding. With this form in place, it appears much less likely that any branch of the military is currently (or will in the future) withholding state income taxes on exempt pay of Native Americans.

A Native American who did have withholding of state income taxes from their exempt military pay could have obtained a refund of those withheld taxes by filing a state income



tax return within the prescribed period. New Mexico does not require any Native American with only exempt income from earnings on their tribal land to file an income tax return, and many do not file. However, an income tax return must be filed within the prescribed period in order to obtain a refund of income tax withheld from wages, or a refund of New Mexico rebates and credits that are refundable (that is, payable even if a taxpayer has no income tax liability).<sup>7</sup>

In New Mexico, the prescribed period for filing for a refund is three years following the year in which the income tax return was due. For example, the 2004 New Mexico income tax return was due on April 15, 2005, so a return for 2004 could be filed to claim a refund of over-withheld income tax as late as December 31, 2008. However, a member of the military who remained on active duty after December 31, 2005 could file their 2004 New Mexico income tax return even later, up to three years following the year they left military service. For example, if an individual left military service in 2008, they could file a 2004 New Mexico income tax return as late as December 31, 2011.

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<sup>7</sup> In connection with the income tax rebate enacted in the 2008 Special Session, a major effort is underway to reach members of Native American and other groups who may not be required to file a New Mexico income tax return to help them file for the rebate as well as for other refundable rebates and credits. Some of these individuals may also be eligible for the federal stimulus check or refundable federal credits, and if so will be aided in filing a federal income tax return as well.

## How Much Was Withheld and What Is the Number and Identity of Affected Native American Veterans or their Survivors?

We have attempted to determine the amount of New Mexico income tax withheld from Native Americans who were resident on their tribal lands during their period of active military duty after July 1, 1977 and before 2004.

As of September 30, 2008, the U.S. Department of Veterans Affairs (VA) estimates that there were 9,664 Native American veterans living in New Mexico.<sup>8</sup> Of these Native American veterans, 4,973 are under age 55, and therefore are very likely to have served after 1977 and had New Mexico income tax withheld from their military pay. Another 2,678 are between the ages of 55 and 69, and could also have had New Mexico income tax withheld from their military pay. Therefore, a total of 7,651 Native American veterans who are living today in New Mexico may have had New Mexico income tax withheld from their military pay.

### Native American Veterans in New Mexico by Age as of September 30, 2008

Age Bracket	Number of Veterans		Percentage of Veterans	
	In Age Bracket	At or Below Bracket Age	In Age Bracket	At or Below Bracket Age
<b>Under 25</b>	437	437	4.5%	4.5%
<b>25 - 29</b>	848	1,285	8.8%	13.3%
<b>30 - 34</b>	623	1,908	6.4%	19.7%
<b>35 - 39</b>	680	2,588	7.0%	26.8%
<b>40 - 44</b>	634	3,222	6.6%	33.3%
<b>45 - 49</b>	742	3,964	7.7%	41.0%
<b>50 - 54</b>	1,009	4,973	10.4%	51.5%
<b>55 - 59</b>	827	5,800	8.6%	60.0%
<b>60 - 64</b>	1,044	6,844	10.8%	70.8%
<b>65 - 69</b>	807	7,651	8.4%	79.2%
<b>70 - 74</b>	446	8,097	4.6%	83.8%
<b>75 - 79</b>	699	8,796	7.2%	91.0%
<b>80 - 84</b>	536	9,332	5.5%	96.6%
<b>85 - 89</b>	234	9,566	2.4%	99.0%
<b>90 and over</b>	98	9,664	1.0%	100.0%
<b>Total</b>	9,664		100.0%	

Source: U.S. Department of Veteran Affairs, National Center for Analysis and Statistics.

<sup>8</sup> U.S. Department of Veterans Affairs, National Center for Analysis and Statistics; state tables available at [http://www1.va.gov/vetdata/docs/VP2007\\_state.htm](http://www1.va.gov/vetdata/docs/VP2007_state.htm).

The VA has not made estimates of the number of Native American veterans who were residents of New Mexico are now deceased, and despite extensive efforts the New Mexico Department of Veterans Services has been unable to obtain specific data on deceased Native American veterans. The number of such deceased veterans who served after 1977 would have survivors who would be able to establish any New Mexico income tax withholding that occurred from the pay of the veteran, and to make a claim for a settlement (see next section).

The actual identity and other characteristics of the Native Americans who might have had New Mexico income tax withheld from their military pay cannot be determined directly from any set of existing records. Military payroll records, which contain information on state income tax withholding, do not include information to establish that the service member was a Native American. Certain military records contain indicators for Native Americans, but no direct indication that they were residents on their tribal lands. Taxation and Revenue income tax return records, needed to determine whether any income tax withholding was refunded, do not identify Native Americans veterans. Only through a procedure (see next section) that begins with self-identification by a Native American veteran (or survivor), and then uses available military and State records, can the identity and other characteristics of Native Americans who might have had New Mexico income tax withheld from their military pay be established.

We are also aware that some Native American veterans assert that New Mexico income tax was withheld from their exempt military pay prior to July 1, 1977. We have repeatedly attempted to obtain documentation of such withholding, but to date have not received any. However, because of these assertions we leave this as an open issue, while proceeding on the basis of all currently available information that New Mexico income tax was not withheld from any member of the military prior to July 1, 1977.

The following two examples illustrate how much New Mexico income tax may have been withheld from the military pay of Native Americans. Tables showing the monthly and annual pay by grade and years of experience, and the monthly and annual New Mexico income tax withholding for those pay/experience levels for a single individual and for a married individual with two dependents for years 1977 through 2007 appear in Appendix F.

### **Example 1**

A Native American domiciled on his tribal lands entered the military on January 1, 1985. He served as an E1 for four months, an E2 for two months, an E3 for twelve months, an E4 for twelve months, and the remaining six months of his 3-year period of service as an E5. His salary was \$573.60 per month as an E1; \$695.40 per month as an E2; \$723.00 per month for both the first and second six months as an E3; \$810.30 per month for the first six months and \$859.50 per month for the second six months as an E4; and \$895.50 per month as an E5.

The amount of New Mexico income tax that may have been withheld depended on the filing status and number of withholding allowances he declared on his W-4 (and any subsequent W-4 he may have filed).

If, for example, he declared his filing status as single and claimed one withholding allowance for himself and an additional withholding allowance because he had only one job, his New Mexico income tax withholding for 1985 would have been \$31.88, for 1986 \$42.48, and for 1987 \$64.98. The three-year total for the period of his service was therefore \$139.34.

**Single Filer (2 withholding allowances)**

Year	Months	Grade	Pay		NM Tax Withholding	
			Monthly	Total	Monthly	Total
1985	4	E1	\$573.60	\$2,294.40	\$1.99	\$7.96
1985	2	E2	\$695.40	\$1,390.80	\$2.84	\$5.68
1985	6	E3	\$723.00	\$4,338.00	\$3.04	\$18.24
1986	6	E3	\$723.00	\$4,338.00	\$2.99	\$17.94
1986	6	E4	\$810.30	\$4,861.80	\$4.09	\$24.54
1987	6	E4	\$859.50	\$5,157.00	\$4.78	\$28.68
1987	6	E5	\$950.10	\$5,700.60	\$6.05	\$36.30
			<b><u>\$28,080.60</u></b>		<b><u>\$139.34</u></b>	

Alternatively, if he was married and had two children, and declared his filing status as joint and declared four withholding allowances, his New Mexico income tax withholding for 1985 would have been \$8.78, for 1986 \$14.88, and for 1987 \$24.84, a three-year total of \$48.50.

**Married Filer (4 withholding allowances)**

Year	Months	Grade	Pay		NM Tax Withholding	
			Monthly	Total	Monthly	Total
1985	4	E1	\$573.60	\$2,294.40	\$0.16	\$0.64
1985	2	E2	\$695.40	\$1,390.80	\$0.89	\$1.78
1985	6	E3	\$723.00	\$4,338.00	\$1.06	\$6.36
1986	6	E3	\$723.00	\$4,338.00	\$0.98	\$5.88
1986	6	E4	\$810.30	\$4,861.80	\$1.50	\$9.00
1987	6	E4	\$859.50	\$5,157.00	\$1.80	\$10.80
1987	6	E5	\$950.10	\$5,700.60	\$2.34	\$14.04
			<b><u>\$28,080.60</u></b>		<b><u>\$48.50</u></b>	

If he did not file a New Mexico income tax return for 1985, 1986 or 1987 (the years covering his period of service), his settlement amount would range from \$48.50 to \$139.34 in this example.

If he filed a New Mexico income tax return for all three years, he would not be entitled to a settlement amount because all of the withheld New Mexico income tax would already have been refunded (or credited against income tax due on other income).

**Example 2**

The facts are the same as in Example 1, except that the Native American entered the military on January 1, 1995 and served through December 31, 1997. His salary was \$790.20 per month as an E1; \$957.60 per month as an E2; \$995.10 per month for the first six months and \$1,013.70 per month for the second six months as an E3; \$1,142.10 per

month for the first six months and \$1,175.30 per month for the second six months as an E4; and \$1,299.90 per month as an E5.

If, for example, on his Form W-4 he declared his filing status as single and claimed one withholding allowance, his New Mexico income tax withholding for the three-year period of his service, 1995 through 1997, would have been \$628.12.

**Single Filer (2 withholding allowances)**

Year	Months	Grade	Pay		NM Tax Withholding	
			Monthly	Total	Monthly	Total
1995	4	E1	\$790.20	\$3,160.80	\$8.27	\$33.08
1995	2	E2	\$957.60	\$1,915.20	\$13.63	\$27.26
1995	6	E3	\$995.10	\$5,970.60	\$14.83	\$88.98
1996	6	E3	\$1,013.70	\$6,082.20	\$15.42	\$92.52
1996	6	E4	\$1,142.10	\$6,852.60	\$19.53	\$117.18
1997	6	E4	\$1,175.30	\$7,051.80	\$20.07	\$120.42
1997	6	E5	\$1,299.90	\$7,799.40	\$24.78	\$148.68
			<b><u>\$38,832.60</u></b>		<b><u>\$628.12</u></b>	

Alternatively, if he was married and had two children, and declared his filing status as joint and declared four withholding allowances, his New Mexico income tax withholding for the three-year period of his service, 1995 through 1997, would have been \$10.68.

**Married Filer (4 withholding allowances)**

Year	Months	Grade	Pay		NM Tax Withholding	
			Monthly	Total	Monthly	Total
1995	4	E1	\$790.20	\$3,160.80	\$0.00	\$0.00
1995	2	E2	\$957.60	\$1,915.20	\$0.00	\$0.00
1995	6	E3	\$995.10	\$5,970.60	\$0.00	\$0.00
1996	6	E3	\$1,013.70	\$6,082.20	\$0.00	\$0.00
1996	6	E4	\$1,142.10	\$6,852.60	\$0.01	\$0.06
1997	6	E4	\$1,175.30	\$7,051.80	\$0.00	\$0.00
1997	6	E5	\$1,299.90	\$7,799.40	\$1.77	\$10.62
			<b><u>\$38,832.60</u></b>		<b><u>\$10.68</u></b>	

If he did not file a New Mexico income tax return for 1995, 1996 or 1997 (the years covering his period of service), his settlement amount would range from \$10.68 to \$628.12 in this example.

If he filed a New Mexico income tax return for all three years, he would not be entitled to a settlement amount because all of the withheld New Mexico income tax would already have been refunded (or credited against income tax due on other income).

**Felipe vs. Taxation and Revenue Department**

One of the sources of data reviewed by the Taxation and Revenue Department to prepare its estimate was the stipulated decision and order on Felipe vs. TRD (Appendix G):

- On July 16, 2004 ninety-two Native American veterans claimed that \$255,644 of New Mexico income tax was withheld from their military pay and had not been refunded.
- Subsequently, another two hundred twenty-three individuals joined the law suit, but no records of their military service are available;
- On April 30, 2007, Judge Hall ordered \$28,040.24 to be paid to the eleven claimants who had filed a timely claim for refund.
- The details of the order are shown in the following table.

Plaintiff	Dates of Service	Total Months of Service	Award for Withholding		
			Total	Average	
				Monthly	Yearly <sup>a</sup>
Galen Leon	2/18/1992 - 12/31/2006 <sup>b</sup>	178	\$5,294.24	\$29.74	\$356.92
Calvin Benally	7/24/2000 - 7/24/2004	48	\$1,828.00	\$38.08	\$457.00
Rolando Chee	5/22/2000 - 5/21/2004	48	\$1,326.00	\$27.63	\$331.50
Marvin Frank	8/16/2000 - 8/15/2004	48	\$1,828.00	\$38.08	\$457.00
Judy Gilmore	1/8/2002 - 2/7/2004	25	\$856.00	\$34.24	\$410.88
Johnell Gould	7/31/1997 - 4/11/2004	81	\$3,080.00	\$38.02	\$456.30
Eric Harrison	8/7/2001 - 8/6/2004	36	\$1,336.00	\$37.11	\$445.33
Henderson Lopez	3/20/2001 - 3/19/2005	48	\$1,828.00	\$38.08	\$457.00
Leonard Pablo Jr.	2/13/2001 - 2/12/2004	36	\$1,336.00	\$37.11	\$445.33
Daryl Smiley	7/21/1997 - 7/20/2001	48	\$1,828.00	\$38.08	\$457.00
Bruce Willie	10/1989-4/2005	186	\$7,500.00	\$40.32	\$483.87

<sup>a</sup> Monthly amount multiplied by 12.

<sup>b</sup> Court documents list dates of service as "2-18-1992 - present", and thus the dates of service for which award of withholding was made are unclear. Because the court documents are dated April 30, 2007, we assume the award was made for withholding from pay for service through December 31, 2006.

- Note that the award for ten of the eleven plaintiffs covered a period after 2003, the end date relevant to the settlement Fund. Pay levels have generally increased in every year since 1977, and withholding has also generally increased in every year, especially for single filers (see Appendix F). So the amounts awarded in Felipe are consistent with the examples given above, when the later time period covered by Felipe is taken into account.
- It should also be noted that of the original ninety-two claimants:
  - 66 had completed their military service prior to 1977, and therefore had no New Mexico income tax withheld from their military pay;
  - Of the remaining twenty-six, only one filed their refund claim in a timely manner;
  - Of the eight of these twenty-six for which Department of Defense records were available, five did not have any New Mexico income tax withheld from their military pay in one or more years;
  - It could be verified that another four had received a refund of the withholding by filing a New Mexico income tax return.

#### **Total Amount of New Mexico Income Tax Withheld**

We have been able to confirm that the Department of Defense has been registered with the New Mexico Taxation and Revenue Department since 1977 and did transmit to the

State of New Mexico state personal income taxes that had been withheld by the Department of Defense. However, these records are only available since 1994 and they show only the gross amount of New Mexico income taxes that were transmitted. There is no way to determine how much of these funds were related to Native American veterans or to any other individual or group of taxpayers.

The Department of Defense does have certain payroll records. However, these records are for limited time periods, and none of them are sorted by ethnicity. As a result, we have been unable to use these records to determine the amount of New Mexico income tax withheld specifically from Native Americans who were residents of their tribal lands in New Mexico and had New Mexico income tax withheld. However, these records may be helpful later to authenticate claims on an individual, case-by-case basis.

According to the August 28, 2008 letter (Appendix D) from Linda Etter with the Defense Finance and Accounting Center:

*“The master military pay account (MMPA) for each member is maintained for 56 years. These MMPAs should reflect the amount of State taxes that were withheld from a member's pay. The MMPA would not show a member's ethnicity. Record information for on-line records can be queried for certain data fields, however, to obtain records for individuals on microfiche you would have to provide the member's name, SSN, and military service in order to obtain the records.*

*Although the amount of State income taxes withheld is also reflected on a W-2 form, the record retention rules provide for destruction of this information 4 years after the end of each payroll year. Thus, DFAS would have the W-2 form information only for tax year 2004.*

.....  
*To obtain military payroll information, another option would be to contact the Defense Manpower Data Center (DMDC), 400 Gigling Rd., Seaside, CA 93955-6771, and establish a Data Request System (DRS) account with them so they can pull the data from their databases. DMDC maintains extracts from DFAS databases back to the mid 1970's, and this would be the most feasible and quickest way to obtain all the State Income Tax Withholding (SITW) data from 1977-2004. Here is the website to obtain a DRS account -[https://www.dmdc.osd.mil/owa/drs/drs.login.Show\\_Login](https://www.dmdc.osd.mil/owa/drs/drs.login.Show_Login)*

These records can only be accessed on a veteran-by-veteran basis, using the veteran's name, address, and social security number to assure the proper records are accessed. Such access will be done as part of the claims process for settlement records.

Absent specific information on affected veterans, the Taxation and Revenue Department has used a variety of data sources and alternative assumptions to estimate the amount of New Mexico income tax that was withheld from exempt military pay of Native Americans. The estimation process had five main steps:

1. Estimate for each year from 1977 through 2003 the number of Native Americans from New Mexico in the military at each pay level. (Military grade and years of

experience determine the pay level, and the pay level is used to determine income tax withholding.)

For example, data from the U.S. Department of Defense (DOD) indicates there were 9,935 Native Americans enlisted in the military. Data from the 2000 Census indicates that 6.68 percent of Native Americans in the United States lived in New Mexico. An estimate of the number of Native Americans from New Mexico in the military is  $9,935 \times 6.68\% = 664$ . DOD data indicates that 28 percent of Native Americans were in grade E-4 in 2000, so the estimate for Native Americans from New Mexico in grade E-4 is  $664 \times 28\% = 186$ . For 2000 DOD pay tables show that the monthly pay for an E-4 with more than two years of experience was \$1,312.80 (corresponding to an annual pay of \$15,753.60; see pay tables in Appendix F).

2. Estimate how many individuals from Step 1, for each year and each pay level, were resident on their tribal lands, and therefore exempt from New Mexico income tax on their military pay.

For example, data from the 2000 Census indicates that 60.4 percent of Native Americans in New Mexico lived on tribal land. An estimate of the number of Native Americans from New Mexico in the military at grade E-4 who were resident on tribal lands is  $186 \times 60.4\% = 112$ .

3. Estimate for each year and each pay level how many of the individuals from Step 2 are single and how many are married. (Income tax withholding varies with marital status.)

Data from DOD indicates that in 2000, 50.28 percent of enlisted personnel were single. An estimate of the number of Native Americans from New Mexico in the military at grade E-4 who were resident on tribal lands and single is  $112 \times 50.28\% = 56$ .

4. Determine the amount of withholding for each year and pay level for single and married individuals, using a typical number of withholding allowances (2 for singles, 4 for married) claimed on Form W-4. (Withholding allowances, marital status and pay determine the amount of income tax withholding prescribed by the New Mexico withholding tables for a year.)

For example, from the 2000 New Mexico income tax withholding tables the amount of withholding per month on a monthly wage of \$1,312.80 was \$16.32 (corresponding to annual withholding of \$195.84).

5. For each year, pay level, and marital status multiply the amount of withholding from Step 4 by the number of individuals from Step 3.



For example, the estimate of the year 2000 New Mexico income tax withholding on all Native Americans from New Mexico in the military at grade E-4 who were resident on tribal lands and single is  $56 \times \$195.84 = \$10,967.04$ .

Adding the figures for all years, all pay levels, and both marital statuses gives a total estimate for New Mexico income tax withholding on exempt military pay of Native Americans.

Alternative estimates were made by changing the assumptions used in Steps 1, 2 and 3 because the data available for making the estimates is not sufficiently detailed.

For example, in Step 1 the alternative assumption was that the percentage of Native Americans in the military from New Mexico was 25 percent higher than the 6.68 percent from the 2000 Census, or  $1.25 \times 6.68\% = 8.35\%$ . Using this percentage provides an alternative estimate of the total number of Native Americans from New Mexico in the military is  $9,935 \times 8.35\% = 830$  and of the number at grade E-4 of  $830 \times 28\% = 232$ .

In Step 2, an alternative estimate is that all Native Americans from New Mexico in the military in 2000 were resident on their tribal lands. The alternative estimate of the number in grade E-4 is therefore 232.

In Step 3, an alternative estimate is that all Native Americans from New Mexico in the military in 2000 were single. The alternative estimate of the number in grade E-4 who were single is therefore 232.

The annual withholding amount from Step 4 is unchanged at \$195.84, so the alternative estimate of the year 2000 New Mexico income tax withholding on all Native Americans from New Mexico in the military at grade E-4 who were resident on tribal lands is  $232 \times \$195.84 = \$45,434.88$ .

Appendix H provides details on the estimating methodology, alternative assumptions and data sources.

The resulting estimates indicate that the total amount of New Mexico income tax withheld from exempt military pay of Native Americans during the period from 1977 through 2003 is likely less than \$2 million.

## **Promulgate Rules for a State Program to Compensate Affected Native American Veterans or their Survivors**

We have developed a draft set of rules for administering the Fund and for making payments from it. The guiding principle of these draft rules is that any settlement payments can and should be made in the fairest way possible. Fairness requires that all Native American veterans who did have New Mexico income tax withheld from their exempt military pay should receive a settlement payment if monies are available for such payments in the Fund. Fairness equally requires that settlement payments should not go to those who did not have such withholding. To insure fairness in making settlement payments, the draft rules necessarily require that all claims for a settlement payment be adequately substantiated. This requirement is also necessary to help insure that payments from the Fund do not violate the anti-donation clause (Article IX, Section 14) of the New Mexico Constitution.

We plan to enter into a formal government-to-government consultation with tribes on these rules before working through the formal process of adopting these rules as a regulation. Once the rules are finalized in a regulation, we plan to begin accepting claims for settlement payments, but no payments will be made until an appropriation is made to the Fund for such payments (see below).

Our draft rules would require substantiation of claims through documentation concerning six basic criteria for eligibility: (1) Status as a Native American; (2) Dates of Military Service; (3) Residency on Tribal Land throughout period of military service; (4) Amount of New Mexico income tax withheld; (5) Verification that any withholding has not already been refunded; and (6) Appropriate survivor to receive the refund.

1. Status as a Native American. The documentation required would be a signed statement that the claimant is an enrolled member of an Indian Nation, Tribe, or Pueblo and the name of the Nation, Tribe, or Pueblo. This is the same requirement that is contained in the New Mexico income tax return for claiming exemption for income earned on tribal land by a Native American living on their tribal land.
2. Dates of Military Service. These dates would be established by the claimant providing their "Certificate of Release or Discharge from Active Duty" (DD Form 214; Appendix I).
3. Residency on Tribal Land Throughout Period of Military Service. This could be established from DD Form 214 if the address shown is on the tribal land of the veteran. If the address is not on tribal land, or cannot be established by the claimant as being on tribal land, such residency could be established by a statement signed by the claimant and attested by a tribal official.
4. Amount of New Mexico Income Tax Withheld. This amount would be established by the claimant providing their Form(s) W-2 for the year(s) of military

service for which New Mexico income tax was withheld. Alternatively, we have established a procedure with the Defense Manpower Data Center (DMDC) to obtain withholding records for any veteran who can supply their DD Form 214 for service after 1983. For service prior to that date, we can work through the various storage centers of the Defense Finance and Accounting Center (DFAS) to obtain withholding records.

5. Verification that Any New Mexico Income Tax Withholding Has Not Already Been Refunded. Claimant would simply sign a statement attesting that they did not file a New Mexico income tax return for the year(s) in which New Mexico income tax was withheld from their military pay. The Taxation and Revenue Department would verify such statements against their records.
6. Appropriate Survivor to Receive the Refund. In the case of a deceased veteran, the claim for refund would be made by the veteran's spouse or by a personal representative (an executor, administrator, or anyone in charge of the deceased veteran's property). The claim would have to be accompanied by a death certificate or other proof of death.

We propose to make payments from the Fund on a "first come, first served" basis until the Fund is exhausted or until no further claims are received. Claims could only cover years prior to 2004, and would have to be made by December 31, 2012 to be eligible for payment.

For Native American veterans who had New Mexico income tax withheld on exempt military pay in 2004 or a later year, there are existing remedies available outside of the Fund. The taxpayer may apply to the Taxation and Revenue Department for a refund by filing a New Mexico income tax return for the year(s) involved.<sup>9</sup> The statute limits the period to request a refund to three years, so a return for 2004 would have to be filed by December 31, 2008.

Future legislation may need to address several issues. One essential issue is to provide an appropriation to the Fund in order to make payment of claims possible. We would propose that a certain amount of any appropriation be specifically identified to cover the cost of administering payments, including necessary outreach, personnel, copies, and communication with the U. S. Department of Defense. A second issue is payment of interest on claims, an issue that has been raised in many of our meetings with Native Americans. SB574 does not authorize the payment of interest on claims, and without specific statutory authority no interest can be paid on any claim against the State. Future legislation should also address the issue of whether the Department of Veterans Services can directly administer payments from the Fund, which will require access to confidential taxpayer information, or whether administration of the Fund should be assigned to the Taxation and Revenue Department.

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<sup>9</sup> Section 7-1-26 NMSA 1978.

## **APPENDIX A: SB574**

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AN ACT  
RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;  
INVESTIGATING THE FEASIBILITY OF REFUNDS TO NATIVE AMERICAN  
VETERANS FOR STATE PERSONAL INCOME TAXES IMPROPERLY WITHHELD  
FROM MILITARY PAY; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. LEGISLATIVE FINDINGS.--

A. Native Americans have had a long history of  
serving their country through active duty in the armed forces  
of the United States during periods of both war and peace and  
have made great sacrifices in serving their country through  
active duty in the military during periods of war and peace.

B. Native American veterans domiciled on tribal  
lands during their periods of active military service may  
have been exempt from paying state personal income taxes on  
their military income, but may have had state personal income  
taxes improperly withheld from their military income.

C. Native American veterans now are barred by the  
state statute of limitations from claiming refunds of state  
personal income taxes that may have been improperly withheld  
from their military income, and even if not barred by the  
statute of limitations, the passage of time extending to  
decades will make it difficult for many Native American  
veterans to meet strict standards of proof that they are

1 entitled to a refund of improperly withheld state personal  
2 income taxes.

3 D. It is incumbent upon the state to ensure that  
4 it was not unjustly enriched by the improper withholding of  
5 state personal income taxes from Native American veterans,  
6 and the state should implement a feasible means of refunding  
7 to Native American veterans any state personal income taxes  
8 that were improperly withheld from military pay.

9 Section 2. DEFINITIONS.--As used in this act:

10 A. "department" means the veterans' services  
11 department;

12 B. "fund" means the Native American veterans'  
13 income tax settlement fund; and

14 C. "secretary" means the secretary of veterans'  
15 services.

16 Section 3. NATIVE AMERICAN VETERANS' INCOME TAX  
17 SETTLEMENT FUND--CREATED--PURPOSE--APPROPRIATIONS.--

18 A. The "Native American veterans' income tax  
19 settlement fund" is created as a nonreverting fund in the  
20 state treasury and shall be administered by the department.  
21 The fund shall consist of money that is appropriated or  
22 donated or that otherwise accrues to the fund. Money in the  
23 fund shall be invested by the state investment officer in the  
24 manner that land grant permanent funds are invested pursuant  
25 to Chapter 6, Article 8 NMSA 1978. Income from investment of

1 the fund shall be credited to the fund.

2 B. The department shall establish procedures and  
3 adopt rules as required to administer the fund and to make  
4 settlement payments from the fund as approved by the  
5 secretary.

6 C. Money in the fund is appropriated to the  
7 department to make settlement payments to Native American  
8 veterans who had state personal income taxes improperly  
9 withheld from their military pay. Money shall be disbursed  
10 from the fund only on warrant of the secretary of finance and  
11 administration upon vouchers signed by the secretary of  
12 veterans' services or the secretary's authorized  
13 representative. Any unexpended or unencumbered balance  
14 remaining at the end of a fiscal year shall not revert to the  
15 general fund.

16 Section 4. DUTIES OF THE SECRETARY.--

17 A. The secretary shall conduct a study in  
18 cooperation with the taxation and revenue department to  
19 determine whether Native American veterans who were domiciled  
20 on tribal lands during the period of their active military  
21 duty had state personal income taxes improperly withheld from  
22 their pay and if so, to determine the amount of state  
23 personal income taxes improperly withheld and the number and  
24 identity of Native American veterans or their survivors  
25 affected by the improper withholding of state personal income

SIAC/SB 574  
Page 3



1 taxes.

2 B. The secretary shall promulgate rules for a  
3 state program to compensate Native American veterans or their  
4 survivors for state personal income taxes improperly withheld  
5 from military income while on active military duty.

6 C. The secretary shall report to the appropriate  
7 interim legislative committee no later than October 1 of each  
8 year regarding estimates of the amount of state personal  
9 income taxes improperly withheld from the military pay of  
10 Native American veterans, the number of Native American  
11 veterans or their survivors affected by the improper  
12 withholding of state personal income taxes, total  
13 expenditures from the fund for the previous fiscal year and  
14 the anticipated appropriations to the fund needed to pay for  
15 settlements to be entered into for the next fiscal year.

16 Section 5. EMERGENCY.--It is necessary for the public  
17 peace, health and safety that this act take effect  
18 immediately. \_\_\_\_\_

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**APPENDIX B: NOVEMBER 22, 2000 MEMORANDUM FOR THE  
GENERAL COUNSEL, DEPARTMENT OF DEFENSE**

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# STATE TAXATION OF INCOME OF CERTAIN NATIVE AMERICAN ARMED FORCES MEMBERS

*The Soldiers' and Sailors' Civil Relief Act prohibits States from taxing the military compensation of Native American armed forces members who are residents or domiciliaries of tribal reservations from which they are absent by reason of their military service.*

November 22, 2000

## MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF DEFENSE

This memorandum responds to your letter to the Acting Associate Attorney General requesting advice as to whether States may tax the military compensation earned by Native American service members who are residents or domiciliaries of federally recognized tribal reservations. As we explain more fully below, we conclude that the Soldiers' and Sailors' Civil Relief Act, construed in light of general principles of federal Indian law, prohibits States from taxing the military compensation of Native American service members who are residents or domiciliaries of tribal reservations, and who are absent from those reservations by virtue of their military service.

### BACKGROUND

Pursuant to agreements between the States and the Department of Treasury entered into under 5 U.S.C. § 5517 (1994 & Supp. IV 1998)), [\(1\)](#) the Department of Defense generally withholds state income tax from the military compensation of service members, including Native American service members, unless the member appropriately claims exemption. Several members of Congress recently wrote to the Secretary of Defense, the Attorney General, and the Secretary of the Interior, asking for their personal intervention to ensure that Native American service members who claim a federally recognized Indian reservation as their legal domicile are not subject to such withholding. *See* Letter for Hon. William S. Cohen, Secretary of Defense, Hon. Janet Reno, Attorney General, and Hon. Bruce Babbitt, Secretary of the Interior, from Hon. George Miller, Senior Democratic Member, House Committee on Resources, et al. (July 18, 2000) ("Miller letter"). The letter stated that under section 514 of the Soldiers' and Sailors' Civil Relief Act ("SSCRA"), ch. 581, 56 Stat. 769, 777, 50 U.S.C. app. § 574 (1994), a military service member "does not lose his permanent residence or domicile solely because of [his] absence [from the place of residence or domicile] in compliance with military orders," and it maintained that the SSCRA "applies to Native Americans as it does to all other Americans residing in lands under the jurisdiction of the United States." *Id.* at 2. Accordingly, the letter asserted, "[a] Native American's domicile should therefore remain unchanged by military service, and a tribal member who resides on a reservation would enjoy the same tax status (i.e. immunity) he had enjoyed in his home state." *Id.* The letter concluded by stating that "[t]he Department [of Defense] should change these [Native American] service members' [income tax] withholding forms to reflect an exemption from state withholding as authorized in the Treasury Financial Manual instructing federal agencies on deductions and withholding issues," and it urged that "no greater burden of proof should be placed on tribal members to establish residency than on any other member of the military." *Id.* at 3.

After receiving the Miller letter, you wrote to the Acting Associate Attorney General requesting an opinion from the Department of Justice as to the applicability of the SSCRA to Native American service members who claim a federally recognized tribal reservation as their residence or domicile. *See* Letter for Dan Marcus, Acting Associate Attorney General, from Douglas A. Dworkin, General

Counsel, Department of Defense (Aug. 9, 2000) ("Dworkin letter"). Your letter noted that while no federal court has yet addressed this question, three state tribunals have concluded that they lacked the authority to impose an income tax on the military compensation of Native Americans domiciled on tribal reservations within their respective States. *Id.* at 1. <sup>(2)</sup> In order to determine whether to continue withholding state income tax from the military pay of those Native American service members who claim a tribal reservation as their residence or domicile, you asked the Department of Justice to provide its opinion on the matter. <sup>(3)</sup>

## DISCUSSION

Determining whether States may, consistent with the SSCRA, tax the military compensation of Native American service members who claim a federally recognized tribal reservation as their place of domicile or residence requires interpreting relevant provisions of the SSCRA against the backdrop of general principles of federal Indian law. We therefore outline some relevant aspects of those general principles before proceeding to discuss the SSCRA and its application here.

### *General Principles of Federal Indian Law*

Historically, the Supreme Court has applied two related principles to States' attempts to exercise jurisdiction over Indian tribes, their reservations, and their members. The first is that of Indian sovereignty. This principle is generally associated with Chief Justice Marshall's explanation that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Building on *Worcester*, subsequent Supreme Court decisions held that "[i]t followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973); *see County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257 (1992) (describing the Court's decision in *Worcester* as concluding that "within reservations state jurisdiction would generally not lie").

More recently, however, the Indian sovereignty doctrine has lost some of its "independent sway," *County of Yakima*, 502 U.S. at 257, and has given way to a second principle: federal preemption. *See McClanahan*, 411 U.S. at 172 ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."). The source of this principle is the Constitution, which assigns to the federal government the responsibility for regulating commerce with Indian tribes and for treaty-making. *See* U.S. Const. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2; *see also McClanahan*, 411 U.S. at 172 n.7; *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959). In light of that grant of federal authority, cases raising questions about the boundaries of permissible state jurisdiction over Indian tribes, their members, and their lands are now typically resolved by giving "individualized treatment" to the "particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The Indian sovereignty doctrine remains relevant, however, as "a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172.

In the area of state taxation, the Supreme Court's application of the federal preemption and Indian sovereignty principles has yielded certain specific rules, two of which are relevant to the matter before us. First, "absent cession of jurisdiction or other federal statutes permitting it," States may not tax "Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero*, 411 U.S. at 148 (describing the rule announced in

*McClanahan*, 411 U.S. at 164); *County of Yakima*, 502 U.S. at 258 ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation [in this area] unless it has 'made its intention to do so unmistakably clear.'" (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)).<sup>(4)</sup> Second, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148-49. In the state taxation context, this second rule means that if a Native American resident of a tribal reservation earns income outside that reservation but within the State in which the reservation is located, then, absent federal law to the contrary, the State may tax that income. *Id.*<sup>(5)</sup>

In cases not squarely controlled by these two rules, the Court applies the federal preemption principle against the backdrop of the Indian sovereignty principle. Preemption analysis asks whether the state law or action at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). To the extent the analysis involves the interpretation of a federal statute, the Court has emphasized that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766; see *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Choate v. Trapp*, 224 U.S. 665 (1912). "[I]n examining the pre-emptive force of the relevant federal legislation," courts "are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

#### *The Soldiers' and Sailors' Civil Relief Act*

The SSCRA was enacted in 1940. See Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178, 50 U.S.C. app. § 501 *et seq.* (1994). It was "[i]n many respects . . . a reenactment" of legislation that had been passed in 1918 and had expired at the end of World War I. *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993); see Act of Mar. 8, 1918, ch. 20, 40 Stat. 440 ("Act of Mar. 8, 1918").<sup>(6)</sup> Noting the substantial similarities between the 1918 and 1940 statutes, the Supreme Court observed that the legislative history of the former could provide useful indications of congressional intent with respect to the latter. See *Boone v. Lightner*, 319 U.S. 561, 565 (1943). That earlier legislative history indicates that Congress intended to "protect[] . . . persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation." Act of Mar. 8, 1918, § 100.

Congress amended the SSCRA in 1942, in part in order to "make available additional and further relief and benefits to persons in the military and naval forces." S. Rep. No. 77-1558, at 2 (1942). The 1942 amendments added section 514, ch. 581, 56 Stat. 769, 777, 50 U.S.C. app. § 574. The first two sentences of the current version of that provision are reproduced below:

For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory,

possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district.

50 U.S.C. app. § 574(1).<sup>(7)</sup> Section 514's first sentence generally provides that, for purposes of state and local income and property taxation, a military service member's residence in a "State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia," shall not change solely because the service member is absent from his place of residence in compliance with military orders. *Id.* The second sentence generally provides that, for purposes of income and property taxation imposed by any "State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia," military compensation earned within such a jurisdiction by a service member who does not reside there shall not be deemed income earned within the jurisdiction. *Id.* Taken together, these provisions have the effect, inter alia, of "prevent[ing] multiple State taxation of the property and income of military personnel serving within various taxing jurisdictions through no choice of their own." H.R. Rep. No. 77-2198, at 6 (1942); S. Rep. No. 77-1558, at 11 (1942).

In the legislative history to the SSCRA's 1942 amendments, Congress made clear that "[a]ny doubts that may arise as to the scope and application of the act should be resolved in favor of the person in military service involved." H.R. Rep. No. 77-2198, at 2; S. Rep. No. 77-1558, at 2. The Supreme Court, in turn, has emphasized that the SSCRA "is always to be liberally construed," *Boone*, 319 U.S. at 575, and should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *California v. Buzard*, 382 U.S. 386, 395 (1966) (quoting *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948)). Of course, the protections afforded by section 514 are not without limits. As the Supreme Court has explained, "[s]ection 514 does not relieve servicemen stationed away from home from all taxes of the host State." *Sullivan v. United States*, 395 U.S. 169, 180 (1969) (holding that section 514's provisions do not extend to sales and use taxes in the host state). With respect to income and property taxes, however, the caselaw emphasizes the need for a liberal construction. *See Buzard*, 382 U.S. at 395. Thus, although section 514's "predominant legislative purpose" is to protect military personnel from "multiple State taxation" of their income and property, *Sullivan*, 395 U.S. at 180, the Court has not limited the scope of section 514 to this one problem:

[T]hough the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence *whether or not that state exercised the right*. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces.

*Dameron v. Brodhead*, 345 U.S. 322, 326 (1953) (emphasis added).<sup>(8)</sup> This broad statutory purpose and presumption in favor of the military service member necessarily informs our application of section 514 to the instant matter.

#### *Section 514 and the Military Income of Native American Service Members*

In order to determine whether section 514 of the SSCRA permits States to tax the military income of Native American service members whose residence is on a tribal reservation, it is useful first to distinguish among the States that might attempt to impose such taxation. They fall into three general categories: States where the service member works but only because of his military service;



States where the service member lives but only because of his military service; and States containing the tribal reservation on which the service member lived until commencing his military service. We address these categories in turn.

Section 514 explicitly addresses both the first and second categories. As to the first, the second sentence of section 514 provides, in pertinent part:

For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District.

50 U.S.C. app. § 574(1). This provision prevents a State from taxing military compensation earned in its jurisdiction by service members who are not otherwise residents of the State. *See Dameron*, 345 U.S. at 326 (section 514 "saved the sole right of taxation to the state of original residence whether or not that state exercised the right"). As to the second category, the first sentence of section 514 provides that no person shall be deemed "to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while and solely by reason of being . . . absent" from his pre-military service residence. 50 U.S.C. app. § 574(1). This provision clearly prohibits a State from taxing the military income of a service member who lives in that State solely in order to comply with his service obligations. *See Buzard*, 382 U.S. at 393 ("The very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders."). For Native Americans, like other military service members, neither the State where a service member works due only to military orders nor a state in which a service member lives due only to such orders may tax the service members' military income.

The third category presents a somewhat more complex case. In order to determine whether the SSCRA permits the State containing a service member's reservation residence to tax his military income, we look initially to the first sentence of section 514. That sentence provides that a military service member "shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders." 50 U.S.C. app. § 574(1). A threshold question is whether this provision preserves the tribal residence of Native Americans. For three reasons, we conclude that it does.

First, an Indian reservation is arguably a "residence . . . in [a] State." That is, since an Indian reservation is located within the geographical boundaries of a State or States, a Native American who resides on a reservation has a residence in a State just as, for example, one who resides in a particular city has a residence in the State containing that city. *See Cohen*, *supra* note 4, at 649 ("[T]ribal lands within the boundaries of state or organized territories have always been considered to be geographically part of the respective state or territory."). Thus, the first sentence of section 514 arguably provides that a Native American service member shall not be deemed to have lost her residence on a reservation located within a State "solely by reason of being absent therefrom in compliance with military or naval orders." 50 U.S.C. app. § 574(1).

Second, and alternatively, while neither the text of the SSCRA nor its legislative history defines the terms "State, Territory, possession, or political subdivision," an Indian reservation might itself be regarded as a "Territory" for purposes of section 514. Although territories are not generally



understood to be subsumed within State boundaries, "when Congress uses the term 'territory', this may be meant to be synonymous with 'place' or 'area', and not necessarily to indicate that Congress has in mind the niceties of language of a political scientist." *Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958). Accordingly, the precise scope of the term "Territory" depends on the purpose and nature of the particular statute in which it is used. *See District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").<sup>(9)</sup> There is no indication in either the text of section 514 or its legislative history that Congress intended to define "Territory" narrowly so as to exclude Native American service members from the statute's protections. Thus, it is arguable that the term as employed in section 514 should be read to include Indian reservations.

Third, even assuming an Indian reservation is not a "Territory" or a "residence . . . in [a] State" within the meaning of section 514, we think it is clear that the statute's recitation of jurisdictions is not intended and should not operate as a limitation on the protection the SSCRA affords to all service members. By its terms, the first sentence of section 514 covers military compensation earned by "any person." 50 U.S.C. app. § 574(1). As the Supreme Court has explained, in the absence of a clear expression to the contrary, "a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Here, there is no indication that Congress intended to exclude Native American residents of tribal reservations from section 514's coverage. Any residual ambiguity on this point is settled by Congress's specific guidance to resolve "[a]ny doubts that may arise as to the scope and application of the [SSCRA] . . . in favor of the person in military service involved," H.R. Rep. No. 77-2198 (1942), at 2, by the Supreme Court's holding that the SSCRA is "always to be liberally construed," *Boone*, 319 U.S. at 575, and by the Court's similar directive that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions to be interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766. In light of these directives, we conclude that section 514 should be read to preserve the reservation residence of Native American service members.<sup>(10)</sup>

Next, we consider what consequences flow from section 514's preservation of Native Americans' reservation residence. It might be argued that, even though section 514 preserves a service member's pre-service residence, the State containing a Native American service member's reservation may still tax his military compensation to the same extent as it may tax the military compensation of other service members whose pre-service residence is in that State. That argument is premised on the theory that Native Americans who live on their reservation are residents of both their reservation and the State in which it is located, and that section 514 preserves both those residences for income tax purposes. Absent federal law to the contrary, a State may tax off-reservation, in-state income earned by reservation Indians whose reservation is in that State. *See Mescalero*, 411 U.S. at 148-49 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). Arguably, *Mescalero* implicitly recognizes that Native Americans who live on a reservation are residents of both their reservation and the State containing it, and that once they leave the reservation to work they are subject to the generally applicable tax laws to which all other residents of the State are subject, including tax liability for both in-state and out-of-state income. The validity of this view is unclear.<sup>(11)</sup> We need not attempt to resolve the issue here, however, because we conclude the SSCRA, especially when read in light of general principles of federal Indian law, preempts any authority a State containing a Native American's tribal residence may otherwise have to tax that Native American's military income.

As noted above, preemption analysis asks whether "under the circumstances of th[e] particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress." *Geier*, 529 U.S. at 873 (quoting *Hines*, 312 U.S. at 67); see *Freightliner*, 514 U.S. at 287. Determining what constitutes a "sufficient obstacle" in this sense is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished -- if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect -- the state law must yield to the regulation of Congress within the sphere of its delegated power.

*Id.* (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

The Supreme Court has explained that "[t]he very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders." *Buzard*, 382 U.S. at 393; see also *Dameron*, 345 U.S. at 326. As this passage suggests, section 514 is intended to provide that if an individual works in a certain jurisdiction because his military service requires him to be there, he should not be subject to any different burdens by virtue of that compulsory presence. <sup>(12)</sup> More specifically, compulsory presence in a particular place may not subject the service member to taxing authorities to which he was not already subject prior to his military service.

Before beginning military service, a Native American resident of a tribal reservation who does not work outside the reservation is not subject to taxation by the State in which the reservation is located. See *McClanahan*, 411 U.S. at 164. If that State were to tax that individual's military income on the theory that it is income earned off-reservation, it would subject him to an income tax to which he was not previously subject, and it would do so by virtue of his compulsory presence in a particular jurisdiction. Section 514's broad, generous purpose is to prevent precisely that eventuality.

We recognize, of course, that some Native American service members could have been subjected to state income tax prior to joining one of the armed services. Under *Mescalero*, a State containing a Native American's tribal residence may, absent federal law to the contrary, subject that tribal member to income tax for income earned outside the reservation. See 411 U.S. at 148-49. <sup>(13)</sup> Prior to enlisting in the military, however, such an individual was not subject to state income tax in a general sense; rather, she was subject to such tax only to the extent that her income was earned outside a reservation. When a reservation Indian enters military service and is directed to perform that service outside her reservation, any income she earns for that service is earned off the reservation because of military orders. Thus, were a State to impose a tax on that military compensation, the tax would be incident to the service member's compulsory presence and work outside her tribal reservation. That is, the tax would result from the individual's compliance with military orders. Such a tax would run afoul of what the *Dameron* Court identified as section 514's core purpose: to protect military service members from being subjected to taxing authorities that rely solely on the members' compulsory presence in a particular jurisdiction as the basis for taxing them. See 345 U.S. at 326. <sup>(14)</sup>

We presume that section 514 was not designed to afford less protection to Native Americans than to other members of the military. See *Federal Power Comm'n*, 362 U.S. at 120 ("[G]eneral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."). Indeed, we are obliged under both federal Indian law and the SSCRA to construe any textual ambiguity on this point in favor of more, rather than less, protection. See *Blackfeet Tribe*, 471 U.S. at 766 (statutes affecting Indians "are to be construed liberally in favor of Indians, with

ambiguous provisions to be interpreted to their benefit"); H.R. Rep. No. 77-2198, at 2 ("Any doubts that may arise as to the scope and application of the act should be resolved in favor of the person in military service involved."); *Boone*, 319 U.S. at 575 (SSCRA "is always to be liberally construed"); *Le Maistre*, 333 U.S. at 6 (SSCRA is to be read "with an eye friendly to those who dropped their affairs to answer their country's call."). Accordingly, we conclude that where a Native American service member who claims a tribal reservation as her residence earns military compensation outside that reservation by virtue of her compliance with military orders, section 514 prohibits the State containing the service member's reservation residence from taxing that military compensation.<sup>(15)</sup>

Finally, you have asked whether our opinion constitutes an adequate legal basis for the Department of Defense to terminate state income tax withholding for Native American service members who certify that they have met the specified criteria. Pursuant to statute, the Attorney General is responsible for providing legal advice to the heads of departments within the Executive Branch. *See* 28 U.S.C. § 512 (1994) ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."). The Attorney General has delegated that responsibility to the Office of Legal Counsel. *See* 28 C.F.R. § 0.25(a) (2000) (assigning to the Assistant Attorney General, Office of Legal Counsel, the responsibility for "[p]reparing the formal opinions of the Attorney General" and for "rendering informal opinions and legal advice to the various agencies of the Government"). In that regard, the legal advice of the Office of Legal Counsel constitutes the legal position of the Executive Branch, unless overruled by the President or the Attorney General. *See* H. Jefferson Powell, *The Constitution and the Attorneys General* xv (1999) ("The published opinions of the Attorneys General and, since 1977, of the Office of Legal Counsel, . . . constitute the formal legal views of that branch of the federal government charged with the faithful execution of the laws."). Accordingly, to the extent that a Native American service member can demonstrate residence on a federally recognized tribal reservation in a manner that satisfies the Defense Department's current standards for establishing entitlement to an exemption from state income tax withholding under section 514 of the SSCRA, the Defense Department may rely on the advice provided in this opinion and not withhold state income tax from such a service member's military compensation. *Cf. Smith v. Jackson*, 246 U.S. 388, 390-91 (1918) (concluding that the Auditor of the Panama Canal Zone should have followed the ruling of the Attorney General on a question of federal statutory law).<sup>(16)</sup>

## CONCLUSION

For the foregoing reasons, we conclude that section 514 of the SSCRA prohibits States from taxing the military compensation of Native American service members who are residents of tribal reservations.

RANDOLPH D. MOSS  
Assistant Attorney General  
Office of Legal Counsel

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1. 5 U.S.C. § 5517 provides, in pertinent part:

(a) When a State statute -

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State; the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. In the case of pay for service as a member of the armed forces, the preceding sentence shall be applied by substituting "who are residents of the State with which the agreement is made" for "whose regular place of Federal employment is within the State with which the agreement is made."

2. See *Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233 (Utah 1994); *Turner v. Wisconsin Dep't of Revenue*, WI St. Tax. Rep. (CCH) P 202-744 (1986); Letter for Emil B. Beck, from Gregory B. Radford, Assistant Director, Personal Taxes Division, North Carolina Department of Revenue, *Re: Docket No. 99-386* (Jan. 25, 2000).

3. Your letter asked the Department to address three sets of questions:

1. Is a tribal reservation a residence or domicile in a "State, Territory, possession, or political subdivision of any of the foregoing" such that the provisions of 50 U.S.C. app. § 574 preserve it as the exclusive residence or domicile of a person who is away from such residence or domicile pursuant to military orders? Is the member not also a resident or domiciliary of the state in which the reservation is located?

2. Is the military compensation earned by a Native American while away from his or her domicile on a tribal reservation pursuant to military orders deemed to have been earned exclusively on the reservation, so as to exempt it from income taxation by the state in which the reservation is located under the rule set forth in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973),] and subsequent cases? If so, does this apply to all tribal reservations of federally recognized tribes?

3. If it is the opinion of the Department of Justice that Native Americans who claim a tribal reservation as their domicile are not subject to state income tax with respect to their military compensation, will that opinion serve as the basis for us to terminate state tax withholding if a member certifies that he or she meets the stated criteria?

Dworkin letter at 2.

4. Before announcing this rule, the *McClanahan* Court analyzed, *inter alia*, the particular nineteenth century treaty that the federal government had entered into with the Navajo Nation, and the Arizona Enabling Act, both of which contained language indicating that the federal government's authority over Navajo reservations was exclusive. See 411 U.S. at 173-75. Thus, *McClanahan* might be read as having turned on a case-specific preemption holding -- a determination that the treaty, enabling act, and other federal legislation relevant to the case preempted the state taxation at issue. But the Court did not, in fact, find any specific federal preemption. As then-Associate Justice Rehnquist later explained, "[a]lthough no legislation directly provided that Indians were to be immune from state taxation under these circumstances, the enactments reviewed were certainly suggestive of that

interpretation. . . . The [*McClanahan*] Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise." *Washington v. Confederated Tribes*, 447 U.S. 134, 179 (1980) (Rehnquist, J., concurring in part and dissenting in part); see Felix Cohen, *Handbook of Federal Indian Law* 269-70 (1982 ed.) (noting that *McClanahan* held the state tax at issue to intrude on a sphere of activities subject only to federal and tribal authority, "despite the lack of any specific conflict with tribal law"). That is, *McClanahan* announced a generally applicable default rule that prohibits state taxation of "reservation lands and reservation Indians" except where authorized by Congress, *County of Yakima*, 502 U.S. at 258, and it analyzed the relevant treaty, enabling act, and other legislation simply to confirm that Congress had not given such authorization in that case. See Thomas C. Mundell, *The Tribal Sovereignty Limitation on State Taxation of Indians: From Worcester to Confederated Tribes and Beyond*, 15 Loy. L.A. L. Rev. 195, 216-17 (1981).

5. It is not clear whether this rule also extends to off-reservation income generated outside the State where the reservation is located. See *infra* note 11.

6. Both the House and Senate Reports accompanying the SSCRA's passage in 1940 described it as "in substance, identical with the [1918 Act]." H.R. Rep. No. 76-3001, at 3 (1940); S. Rep. No. 76-2109, at 4 (1940).

7. Although the concepts of "residence" and "domicile" may in some settings have slightly different legal consequences, see Black's Law Dictionary 1309 (6th ed. 1990) (comparing and distinguishing the two terms), section 514 uses them together without distinguishing them. For purposes of state taxation, therefore, section 514 preserves military service members' pre-service domicile and residence in precisely the same manner. Because the two concepts are not distinguished for these purposes, the balance of this memorandum generally uses the term "residence."

8. In *Sullivan*, the Court explained that, although it had previously described section 514's purpose broadly in *Dameron*, the provision's "predominant legislative purpose" is "to prevent multiple State taxation." 395 U.S. at 180. Because "the substantial risk of double taxation under multi-state ad valorem property taxes does not exist with respect to sales and use taxes," the Court concluded that section 514's protections do not cover host States' sales and use taxes. *Id.*

9. In *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1855), for example, the Court held that for purposes of a federal full faith and credit statute covering "letters testamentary or of administration . . . granted, by the proper authority in any of the United States or the territories thereof," a Cherokee Indian reservation "may be considered a territory of the United States." *Id.* at 103-04; see *id.* at 103 (explaining that the Indian reservation was "not a foreign, but a domestic territory -- a territory which originated under our constitution and laws"); see also, e.g., *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989) (holding that "the Cherokee tribe is a 'state'" under the Parental Kidnapping Prevention Act, which defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States," 28 U.S.C. § 1738A(b)(8)); *Jim v. CIT Fin. Servs. Corp.*, 87 N.M. 362, 363 (1975) (citing *Mackey* and holding that "the Navajo Nation is a 'territory' within the meaning of [28 U.S.C. § 1738]"); Cohen, *supra* note 4, at 383, 385, 649 n.42 (noting that "territory" has been held to encompass tribal reservations in some contexts). Similar results have been reached in interpreting state statutes. In *Tracy v. Superior Court of Maricopa County*, 168 Ariz. 23 (1991) (en banc), for example, the Supreme Court of Arizona considered whether a Native American tribe could be considered a "territory" under Arizona's Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, Ariz. Rev. Stat. §§ 13-4091 to 13-4096 (1989). The court noted that "Indian tribes . . . have often been regarded as territories for purposes of various statutory enactments," *id.* at

32 (collecting cases), and explained that "[t]he proper approach is to analyze each statute, in terms of its purpose and policy, to determine whether Indian tribes may be regarded as territories within the statute's intent." *Id.* at 33. After undertaking that approach, the court concluded that "a tribe may be considered a territory for purposes of statutory enactments such as the one now before us." *Id.* at 44.

The Supreme Court has, however, indicated its support for the opposite conclusion in other statutory contexts. *See, e.g., New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909) (citing with approval *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883), in which a district court held that the Cherokee nation was not a "territory" under the federal extradition statute). And at least one lower federal court has concluded that a tribal reservation does not constitute a "Territory" under 28 U.S.C. § 1738 (1994), the general full faith and credit statute. *See Wilson v. Marchington*, 127 F.3d 805, 808-09 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). But in *Wilson*, the Ninth Circuit based its holding not on a general finding that tribal reservations are not territories, but on the fact that, after 28 U.S.C. § 1738 was enacted, Congress passed a number of other statutes expressly extending full faith and credit to certain tribal proceedings. *See* 127 F.3d at 809 (citing 25 U.S.C. §§ 2201-11 (1983), 25 U.S.C. § 1725(g) (1980), and 25 U.S.C. §§ 1901 *et seq.*). The court observed that "[i]f full faith and credit had already been extended to Indian tribes, enactment of [the later statutes] would not have been necessary." *Id.* Here, in contrast, there is no post-section 514 legislation to undermine the argument that section 514's use of the word "Territory" should be read to encompass tribal reservations.

10. It is true that the Supreme Court has "repeatedly said that tax exemptions are not granted by implication," and "[i]t has applied that rule to taxing acts affecting Indians as to all others." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943). Accordingly, in *Oklahoma Tax Comm'n* the Court held that "[i]f Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences." *Id.* at 607; *see Mescalero*, 411 U.S. at 156-57. Here, however, it is clear that by passing section 514 Congress did indeed intend to grant a tax exemption to military service members. That is, the statute satisfies the requirement that Congress state its intent to grant a tax exemption "in plain words." *Oklahoma Tax Comm'n*, 319 U.S. at 607. The question is how that exemption applies to Native Americans who reside on tribal reservations. In such circumstances, courts follow the rule that "ambiguous statutes . . . are to be construed in favor of Indians, and this canon of statutory construction applies to tax exemptions." *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878, 881 (9th Cir. 1982); *see Blackfeet Tribe*, 471 U.S. at 766; *see also Cotton Petroleum Corp.*, 490 U.S. at 176-77 ("[F]ederal pre-emption [of state taxing authority] is not limited to cases in which Congress has expressly - as compared to impliedly - pre-empted the state activity.").

11. This uncertainty is due in part to the fact that while *Mescalero* made clear that a State may tax the off-reservation income of a Native American resident of a reservation within that State, it did not specify the precise source of that taxing power. As a general matter, a State may "tax all the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chicksaw Nation*, 515 U.S. 450, 462-63 (1995). But for nonresidents, a State generally may tax only income earned within the jurisdiction. *Id.* at 463 n.11. It is unclear which head of taxing authority supports the decision in *Mescalero*. If it is the former, then the State may also tax the out-of-state income of Native Americans who reside on reservations within the State; if it is the latter, the State may not.

At bottom, the question here concerns the precise relationship between Native Americans residing on reservations and the States in which those reservations are located. The question is not easily answered. On the one hand, there may be some basis for States to treat reservation Indians

working off the reservation as full state residents. Indeed, it is clear that Native Americans are deemed state residents for certain purposes. *See Goodluck v. Apache Country*, 417 F. Supp. 13 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976). "They have the right to vote, to use state courts, and they receive some state services." *McClanahan*, 411 U.S. at 173 (footnotes omitted). At least one court has relied on these facts to conclude that "[a]n enrolled member of a tribe living on a reservation is subject to three levels of governmental jurisdiction: the tribe, the state, and the federal government. Being a resident of one does not remove the person from the jurisdiction of the others. An enrolled member of a tribe living on the tribe's reservation remains domiciled in the state and is a resident of the state for limited purposes." *Esquiro v. Department of Revenue*, 14 Or. Tax 130, 134 (Or. Tax 1997). On the other hand, a leading treatise on federal Indian law suggests that reservation Indians working off the reservation are, for taxation purposes at least, in the same position as nonresidents working in the State: "[A]n Indian residing within a reservation but earning some income off the reservation can be taxed to the extent of the off-reservation income, *provided that the State bases its income tax on place of earning*." Cohen, *supra* note 4, at 417 (emphasis added). A federal district court recently took a similar approach. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, No. 00-C-0113-C (slip op.) (W.D. Wis. Sept. 8, 2000). In that case, the court held that Wisconsin lacked the authority to tax income earned outside Wisconsin by a Native American resident of a tribal reservation located within Wisconsin. According to the court, "[t]he state may tax persons resident within its borders who do not live on reservations because it has conferred upon these persons the benefit of domicile and its accompanying privileges and advantages. It has not conferred the same benefit upon tribal members residing on reservations, however. The right of tribal members to reside on the reservation derives from treaties entered into by the tribe in the nineteenth century." *Id.* at 11-12.

12. The legislative history to the SSCRA's predecessor supports this reading. *See* Act of Mar. 8, 1918, § 100 (Congress intended to "protect[] . . . persons in military service of the United States in order to *prevent prejudice or injury to their civil rights during their term of service* and to enable them to devote their entire energy to the military needs of the Nation.") (emphasis added).

13. As discussed above, *see supra* note 11, it is unclear whether a State's authority to tax income earned in the State by a Native American resident of a reservation who is working off the reservation is based on the State's authority to tax all residents of the State or the State's authority to tax income earned within the State by nonresidents working there. To the extent that a State's authority to tax such tribal members is based, not on the individual's residence in that State, but on the place where the income is generated, then, wholly apart from any tax exemption conferred by the SSCRA, the only tribal residents whose military income could possibly be subject to state taxation would be those who perform military service within the State in which their reservation residence is located. In light of our analysis of the SSCRA's preemptive force, we need not, and do not, reach that issue here. *See supra* p. 11.

14. We have found one case, *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), that is arguably in tension with this analysis, but the outcome reached in that case is not contrary to the conclusion we reach here. In *Kansas*, the Tenth Circuit held that Kansas did not violate section 514 of the SSCRA by taking the military income of nonresident service members into account when determining the rate of income tax to be levied on their nonmilitary income earned in Kansas (typically by the service member's spouse). *See id.* at 936-38 & n.2. Although the court noted that "higher tax rates and, consequently, higher taxes on nonmilitary Kansas source income can result from including military pay in the state's rate-setting formula," *id.* at 936, it concluded that "[n]either the legislative history nor the plain language of the SSCRA prohibits the use of the described military income in formulas which set rates of taxation on other income." *Id.* at 938. The court specifically rejected the federal government's contention that "the potentially higher rates on Kansas source income constitute 'an



indirect tax on the military compensation of nonresident military personnel," and held that "[t]here is here a potentially higher tax on Kansas source income, nothing more." *Id.* (citation omitted). *Kansas* does not bear directly on the precise question at issue here, since in that case the service member was already subject to some host state income tax for nonmilitary income. But insofar as it may stand for the proposition that a military service member may be forced to shoulder a greater state income tax burden as a direct consequence of his compulsory presence in a particular jurisdiction in compliance with military orders, we find the Tenth Circuit's reasoning to conflict with section 514's broad, generous purpose as identified by the Supreme Court in *Dameron*, 345 U.S. at 326, *Buzard*, 382 U.S. at 393, and elsewhere.

15. As discussed above, *see supra* note 4, the *McClanahan* rule barring state taxation of income earned on a reservation is a "categorical" one, *County of Yakima*, 502 U.S. at 258, and prohibits state taxation of Indian lands and reservation Indians except where authorized by Congress. But the rule would not apply -- and our conclusion regarding the effect of the SSCRA could well be different -- in a situation where Congress had separately authorized a State or States to tax the reservation income of a reservation Indian. We are aware of no such authorization. The *McClanahan* Court surveyed a number of federal statutes in this area, and concluded that they manifest "Congress' intent to maintain the tax-exempt status of reservation Indians." 411 U.S. at 176. Similarly, in *Bryan v. Itasca County*, the Court held that although 28 U.S.C. § 1360 grants certain States jurisdiction over private civil litigation involving reservation Indians in state court, it does not grant those States general civil regulatory authority over reservation Indians. *See* 426 U.S. at 385, 388-90. The Court therefore held that the statute does not empower States to tax property on a reservation.

16. Moreover, we are informed by the Department's Tax Division that to the extent that Native American service members properly claiming a tribal reservation as their residence become involved in legal proceedings concerning their possible liability for state income tax on their military compensation, the Tax Division will, upon request from the Defense Department, provide legal representation to such service members where appropriate.



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## **APPENDIX C: 2003 IRS Form W-4**

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# Form W-4 (2003)

**Purpose.** Complete Form W-4 so that your employer can withhold the correct Federal income tax from your pay. Because your tax situation may change, you may want to refigure your withholding each year.

**Exemption from withholding.** If you are exempt, complete only lines 1, 2, 3, 4, and 7 and sign the form to validate it. Your exemption for 2003 expires February 16, 2004. See Pub. 505, Tax Withholding and Estimated Tax.

**Note:** You cannot claim exemption from withholding if: (a) your income exceeds \$750 and includes more than \$250 of unearned income (e.g., interest and dividends) and (b) another person can claim you as a dependent on their tax return.

**Basic instructions.** If you are not exempt, complete the **Personal Allowances Worksheet** below. The worksheets on page 2 adjust your withholding allowances based on itemized

deductions, certain credits, adjustments to income, or two-earner/two-job situations. Complete all worksheets that apply. However, you may claim fewer (or zero) allowances.

**Head of household.** Generally, you may claim head of household filing status on your tax return only if you are unmarried and pay more than 50% of the costs of keeping up a home for yourself and your dependent(s) or other qualifying individuals. See line E below.

**Tax credits.** You can take projected tax credits into account in figuring your allowable number of withholding allowances. Credits for child or dependent care expenses and the child tax credit may be claimed using the **Personal Allowances Worksheet** below. See Pub. 919, How Do I Adjust My Tax Withholding? for information on converting your other credits into withholding allowances.

**Nonwage income.** If you have a large amount of nonwage income, such as interest or dividends, consider making estimated tax payments using

**Form 1040-ES, Estimated Tax for Individuals.** Otherwise, you may owe additional tax.

**Two earners/two jobs.** If you have a working spouse or more than one job, figure the total number of allowances you are entitled to claim on all jobs using worksheets from only one Form W-4. Your withholding usually will be most accurate when all allowances are claimed on the Form W-4 for the highest paying job and zero allowances are claimed on the others.

**Nonresident alien.** If you are a nonresident alien, see the **Instructions for Form 8233** before completing this Form W-4.

**Check your withholding.** After your Form W-4 takes effect, use Pub. 919 to see how the dollar amount you are having withheld compares to your projected total tax for 2003. See Pub. 919, especially if your earnings exceed \$125,000 (Single) or \$175,000 (Married).

**Recent name change?** If your name on line 1 differs from that shown on your social security card, call 1-800-772-1213 for a new social security card.

## Personal Allowances Worksheet (Keep for your records.)

A	Enter "1" for <b>yourself</b> if no one else can claim you as a dependent . . . . .	A	_____
B	Enter "1" if: <ul style="list-style-type: none"><li>• You are single and have only one job; or</li><li>• You are married, have only one job, and your spouse does not work; or</li><li>• Your wages from a second job or your spouse's wages (or the total of both) are \$1,000 or less.</li></ul> . . . . .	B	_____
C	Enter "1" for your <b>spouse</b> . But, you may choose to enter "-0-" if you are married and have either a working spouse or more than one job. (Entering "-0-" may help you avoid having too little tax withheld.) . . . . .	C	_____
D	Enter number of <b>dependents</b> (other than your spouse or yourself) you will claim on your tax return . . . . .	D	_____
E	Enter "1" if you will file as <b>head of household</b> on your tax return (see conditions under <b>Head of household</b> above) . . . . .	E	_____
F	Enter "1" if you have at least \$1,500 of <b>child or dependent care expenses</b> for which you plan to claim a credit . . . . .	F	_____
<b>(Note: Do not include child support payments. See Pub. 503, Child and Dependent Care Expenses, for details.)</b>			
G	<b>Child Tax Credit</b> (including additional child tax credit): <ul style="list-style-type: none"><li>• If your total income will be between \$15,000 and \$42,000 (\$20,000 and \$65,000 if married), enter "1" for each eligible child plus 1 additional if you have three to five eligible children or 2 additional if you have six or more eligible children.</li><li>• If your total income will be between \$42,000 and \$80,000 (\$65,000 and \$115,000 if married), enter "1" if you have one or two eligible children, "2" if you have three eligible children, "3" if you have four eligible children, or "4" if you have five or more eligible children.</li></ul>	G	_____
H	Add lines A through G and enter total here. <b>Note:</b> This may be different from the number of exemptions you claim on your tax return. <b>▶</b>	H	_____
For accuracy, complete all worksheets that apply. <ul style="list-style-type: none"><li>• If you plan to <b>itemize or claim adjustments to income</b> and want to reduce your withholding, see the <b>Deductions and Adjustments Worksheet</b> on page 2.</li><li>• If you have <b>more than one job</b> or are <b>married and you and your spouse both work</b> and the combined earnings from all jobs exceed \$35,000, see the <b>Two-Earner/Two-Job Worksheet</b> on page 2 to avoid having too little tax withheld.</li><li>• If <b>neither</b> of the above situations applies, <b>stop here</b> and enter the number from line H on line 5 of Form W-4 below.</li></ul>			

Cut here and give Form W-4 to your employer. Keep the top part for your records.

Form <b>W-4</b> Department of the Treasury Internal Revenue Service		<b>Employee's Withholding Allowance Certificate</b>		OMB No. 1545-0010 <b>2003</b>
▶ For Privacy Act and Paperwork Reduction Act Notice, see page 2.				
1 Type or print your first name and middle initial		Last name		2 Your social security number
Home address (number and street or rural route)		3 <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Married, but withhold at higher Single rate. <b>Note:</b> If married, but legally separated, or spouse is a nonresident alien, check the "Single" box.		
City or town, state, and ZIP code		4 If your last name differs from that shown on your social security card, check here. You must call 1-800-772-1213 for a new card. <input type="checkbox"/>		
5 Total number of allowances you are claiming (from line H above or from the applicable worksheet on page 2)				5
6 Additional amount, if any, you want withheld from each paycheck . . . . .				6 \$
7 I claim exemption from withholding for 2003, and I certify that I meet <b>both</b> of the following conditions for exemption: <ul style="list-style-type: none"><li>• Last year I had a right to a refund of <b>all</b> Federal income tax withheld because I had <b>no</b> tax liability <b>and</b></li><li>• This year I expect a refund of <b>all</b> Federal income tax withheld because I expect to have <b>no</b> tax liability.</li></ul> If you meet both conditions, write "Exempt" here . . . . . ▶				7
Under penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate, or I am entitled to claim exempt status.				
Employee's signature (Form is not valid unless you sign it.) ▶				
Date ▶				
8 Employer's name and address (Employer: Complete lines 8 and 10 only if sending to the IRS.)		9 Office code (optional)		10 Employer identification number

Cat. No. 10220Q

**Deductions and Adjustments Worksheet****Note:** Use this worksheet **only** if you plan to itemize deductions, claim certain credits, or claim adjustments to income on your 2003 tax return.

**1** Enter an estimate of your 2003 itemized deductions. These include qualifying home mortgage interest, charitable contributions, state and local taxes, medical expenses in excess of 7.5% of your income, and miscellaneous deductions. (For 2003, you may have to reduce your itemized deductions if your income is over \$139,500 (\$69,750 if married filing separately). See **Worksheet 3** in Pub. 919 for details.) **1** \$ \_\_\_\_\_

**2** Enter:  $\left\{ \begin{array}{l} \$7,950 \text{ if married filing jointly or qualifying widow(er)} \\ \$7,000 \text{ if head of household} \\ \$4,750 \text{ if single} \\ \$3,975 \text{ if married filing separately} \end{array} \right\}$  **2** \$ \_\_\_\_\_

**3** Subtract line 2 from line 1. If line 2 is greater than line 1, enter "-0-" **3** \$ \_\_\_\_\_

**4** Enter an estimate of your 2003 adjustments to income, including alimony, deductible IRA contributions, and student loan interest **4** \$ \_\_\_\_\_

**5** Add lines 3 and 4 and enter the total. Include any amount for credits from **Worksheet 7** in Pub. 919 **5** \$ \_\_\_\_\_

**6** Enter an estimate of your 2003 nonwage income (such as dividends or interest) **6** \$ \_\_\_\_\_

**7** Subtract line 6 from line 5. Enter the result, but not less than "-0-" **7** \$ \_\_\_\_\_

**8** Divide the amount on line 7 by \$3,000 and enter the result here. Drop any fraction **8** \_\_\_\_\_

**9** Enter the number from the **Personal Allowances Worksheet**, line H, page 1 **9** \_\_\_\_\_

**10** Add lines 8 and 9 and enter the total here. If you plan to use the **Two-Earner/Two-Job Worksheet**, also enter this total on line 1 below. Otherwise, **stop here** and enter this total on Form W-4, line 5, page 1 **10** \_\_\_\_\_

**Two-Earner/Two-Job Worksheet****Note:** Use this worksheet **only** if the instructions under line H on page 1 direct you here.

**1** Enter the number from line H, page 1 (or from line 10 above if you used the **Deductions and Adjustments Worksheet**) **1** \_\_\_\_\_

**2** Find the number in **Table 1** below that applies to the **lowest** paying job and enter it here **2** \_\_\_\_\_

**3** If line 1 is **more than or equal to** line 2, subtract line 2 from line 1. Enter the result here (if zero, enter "-0-") and on Form W-4, line 5, page 1. **Do not** use the rest of this worksheet **3** \_\_\_\_\_

**Note:** If line 1 is **less than** line 2, enter "-0-" on Form W-4, line 5, page 1. Complete lines 4-9 below to calculate the additional withholding amount necessary to avoid a year-end tax bill.

**4** Enter the number from line 2 of this worksheet **4** \_\_\_\_\_

**5** Enter the number from line 1 of this worksheet **5** \_\_\_\_\_

**6** Subtract line 5 from line 4 **6** \_\_\_\_\_

**7** Find the amount in **Table 2** below that applies to the **highest** paying job and enter it here **7** \$ \_\_\_\_\_

**8** Multiply line 7 by line 6 and enter the result here. This is the additional annual withholding needed **8** \$ \_\_\_\_\_

**9** Divide line 8 by the number of pay periods remaining in 2003. For example, divide by 26 if you are paid every two weeks and you complete this form in December 2002. Enter the result here and on Form W-4, line 6, page 1. This is the additional amount to be withheld from each paycheck **9** \$ \_\_\_\_\_

**Table 1: Two-Earner/Two-Job Worksheet**

Married Filing Jointly				All Others			
If wages from LOWEST paying job are—	Enter on line 2 above	If wages from LOWEST paying job are—	Enter on line 2 above	If wages from LOWEST paying job are—	Enter on line 2 above	If wages from LOWEST paying job are—	Enter on line 2 above
\$0 - \$4,000	0	44,001 - 50,000	8	\$0 - \$6,000	0	75,001 - 100,000	8
4,001 - 9,000	1	50,001 - 60,000	9	6,001 - 11,000	1	100,001 - 110,000	9
9,001 - 15,000	2	60,001 - 70,000	10	11,001 - 18,000	2	110,001 and over	10
15,001 - 20,000	3	70,001 - 90,000	11	18,001 - 25,000	3		
20,001 - 25,000	4	90,001 - 100,000	12	25,001 - 29,000	4		
25,001 - 33,000	5	100,001 - 115,000	13	29,001 - 40,000	5		
33,001 - 38,000	6	115,001 - 125,000	14	40,001 - 55,000	6		
38,001 - 44,000	7	125,001 and over	15	55,001 - 75,000	7		

**Table 2: Two-Earner/Two-Job Worksheet**

Married Filing Jointly			All Others		
If wages from HIGHEST paying job are—	Enter on line 7 above		If wages from HIGHEST paying job are—	Enter on line 7 above	
\$0 - \$50,000	\$450		\$0 - \$30,000	\$450	
50,001 - 100,000	800		30,001 - 70,000	800	
100,001 - 150,000	900		70,001 - 140,000	900	
150,001 - 270,000	1,050		140,001 - 300,000	1,050	
270,001 and over	1,200		300,001 and over	1,200	

**Privacy Act and Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. The Internal Revenue Code requires this information under sections 3402(f)(2)(A) and 6109 and their regulations. **Failure to provide a properly completed form will result in your being treated as a single person who claims no withholding allowances; providing fraudulent information may also subject you to penalties.** Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, to cities, states, and the District of Columbia for use in administering their tax laws, and using it in the National Directory of New Hires. We may also disclose this information to Federal and state agencies to enforce Federal nontax criminal laws and to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB

control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Code section 6103.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping**, 46 min.; **Learning about the law or the form**, 13 min.; **Preparing the form**, 59 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **Do not** send the tax form to this address. Instead, give it to your employer.



**APPENDIX D: August 28, 2008 Letter from Linda Etter  
Assistant General Counsel, Military and Civilian Pay Law,  
Defense Finance and Accounting Center (DFAS)**

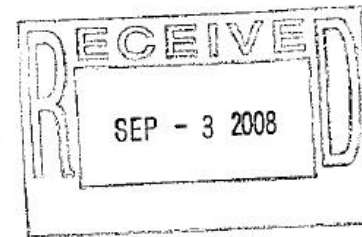
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## DEFENSE FINANCE AND ACCOUNTING SERVICE

8899 EAST 56TH STREET  
INDIANAPOLIS, INDIANA 46249

August 28, 2008



Mr. Rick Homans  
Cabinet Secretary  
Taxation and Revenue Department  
P.O. Box 630  
Santa Fe, New Mexico 87504-0630

Dear Mr. Homans:

This is in response to your letter, dated June 18, 2008, concerning the withholding of New Mexico income taxes from the pay of military members who are Native Americans. For your information, an interim response was provided to Ms. Libby Gonzales, Director of the Revenue Processing Division, and the final response was e-mailed to her on Monday of this week.

The questions presented and my responses are as follows:

1. For documentation purposes, would you confirm that the Department of Defense did not withhold from Native American military personnel any NM state income tax withholding prior to July 1, 1977?

Yes, the Department of Defense (DoD) did not withhold any State income taxes from the pay of military members prior to July 1, 1977. The authority to deduct State income taxes from a member's pay is set forth in 5 U.S.C. 5517. This statute was amended in 1976 to authorize the withholding of State income taxes from the pay of a military member. See Pub. L. No. 94-455, section 1207 (1976). The amendment was effective with regard to wages withheld after the 120-day period after a State requested to enter into a withholding agreement with the Department of Treasury. See Pub. L. No. 94-455, section 1207(f) (1976). Based upon this authority, the earliest date that the withholding of State income taxes from the pay of a military member began was July 1, 1977. See TFM, Vol. I, part 3, chapter 5000. Thus, prior to July 1, 1977, DoD did not have authority to withhold State income taxes from the pay of a military member.

2. Does the Department of Defense have records showing NM state income tax withholding for all or any portion of the period 1977 through 2004? If so, could we get the relevant portions of these records in electronic format? The relevant information

[www.dfas.mil](http://www.dfas.mil)  
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would include: Name, address, SSN, pay periods, total pay, taxable pay (under federal income tax rules), NM state income tax withholding, and (if available) ethnicity.

The master military pay account (MMPA) for each member is maintained for 56 years. An MMPA should reflect the amount of State taxes that were withheld from a member's pay. However, the MMPA would not show a member's ethnicity.

The MMPA records for Air Force members are maintained in electronic format from 1990 to 2008. From 1971 to 1990, the MMPA records are maintained on microfiche, and these records are maintained in the Denver Federal Records Center, Denver, CO.

For Navy members, the MMPA records are maintained on-line (electronic format) from 1998 to 2008. Prior to that, the records are on microfiche. Some of the microfiche records are maintained at the Defense Finance and Accounting Service (DFAS) at Cleveland, and some of the microfiche records are maintained at the St. Louis Federal Records Center, St Louis, MO. The microfiche at DFAS Cleveland goes back to 1993 and prior to that, it is stored in the archives at the St. Louis Federal Records Center.

For Marine Corps members, DFAS can obtain history records on-line from 1999 to 2008, and prior to that, DFAS has Leave and Earnings Statement records back to 1969 on microfiche. The Marine Corps microfiche has been sent to the DFAS Cleveland site.

For Army members, DFAS has MMPA records on-line from October 1991 to 2008. Prior to that time, DFAS has microfiche that goes back to December 1971, which is located at DFAS Indianapolis.

Record information for on-line records can be queried for certain data fields, however, to obtain records for individuals on microfiche, DFAS would need to be provided the member's name, SSN, and military service in order to obtain the records.

Although the amount of State income taxes withheld is also reflected on a W-2 form, the record retention rules provide for destruction of this information 4 years after the end of each payroll year. Thus, DFAS would have the W-2 form information only for tax year 2004.

If your agency wants to obtain a copy of DFAS records, please contact our FOIA/PA Program Manager, Ms. Linda Krabbenhoft, to request the specific records needed. However, another option to obtain military payroll information would be to contact the Defense Manpower Data Center (DMDC), 400 Gigling Rd., Seaside, CA 93955-6771, and establish a Data Request System (DRS) account with them so they can pull the data from their databases. DMDC maintains extracts from DFAS databases back to the mid-1970's, and this would be the most feasible and quickest way to obtain all the State Income Tax Withholding (SITW) data from 1977-2004. Here is the web site to obtain a DRS account -[https://www.dmdc.osd.mil/owa/drs/drs.login.Show\\_Login](https://www.dmdc.osd.mil/owa/drs/drs.login.Show_Login)

3. Some Native American veterans have indicated that they believe they had NM state income tax withholding taken from their military pay as early as 1942. Based on the June 28, 2004, letter referenced above, our understanding is that no NM state income taxes were withheld by DoD from pay to any member of the armed services prior to the 1977 withholding agreement. Can you provide any insight as to why these veterans believe they had NM state income tax withheld from their armed forces pay prior to 1977?

I do not have any insight as to why these veterans might believe that NM income taxes were withheld from their military pay prior to July 1, 1977. I would note that their pay was generally subject to the withholding of Federal income taxes and FICA (social security and Medicare) taxes prior to July 1977, and there may be confusion as to which type of taxes were actually withheld from their pay. In addition, there was authority to withhold State income taxes from the pay of civilian employees prior to July 1977, which may also contribute to the confusion.

4. In our discussions with Native American veterans, the Departments were presented with records by veterans from the Vietnam era that contained "other" deductions. Can you confirm that the "other" deductions were not NM state income tax withholding?

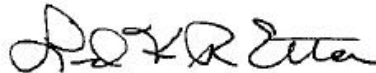
To our knowledge, the use of the term "other" deductions was not applied to State income tax withholding. Depending on the Military Department, the component, the pay system, and the year, the term "other deductions" should have referred to deduction items, such as life insurance, Armed Forces Retirement Home contributions, or GI Bill deductions.

5. Would you please identify a contact person who we could meet with concerning this issue?

The POC is Laurie Eldridge, who may be reached at 216-204-3631. She is located at the DFAS Cleveland Center. She may also be reached by e-mail at [laurie.eldridge@dfas.mil](mailto:laurie.eldridge@dfas.mil).

If you need any other information, please let me know.

Sincerely,



Linda K. R. Etter  
Assistant General Counsel  
Military and Civilian Pay Law  
DFAS Denver  
303-676-7514

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## **APPENDIX E: DD Form 2058-2**

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# NATIVE AMERICAN STATE INCOME TAX WITHHOLDING EXEMPTION CERTIFICATE

## PRIVACY ACT STATEMENT

**AUTHORITY:** 5 U.S.C. 5516, 5517, and EO 9397.

**PRINCIPAL PURPOSE(S):** To enable a Native American service member to stop State income taxes withholding from military compensation.

**ROUTINE USE(S):** The information obtained will become part of the active duty pay system of records of the service concerned and may be disclosed to routine users of these records (including State tax authorities) as disclosed in its record system notice.

**DISCLOSURE:** Disclosure is voluntary. Failure to complete this form will result in withholding of State income taxes from your pay. Disclosure of SSN is voluntary. However, to avoid erroneous application of your withholding exemption to the account of another member, this exemption certificate will not be processed without your SSN.

1. NAME (Last, First, Middle Initial)	2. SOCIAL SECURITY NUMBER
3. MILITARY ADDRESS (Unit, Street, City, State, ZIP Code)	
4. CURRENT MAILING ADDRESS (Street, City, State, ZIP Code)	
5. NAME OF FEDERALLY RECOGNIZED TRIBE THAT YOU ARE A MEMBER OF	
6. NAME OF FEDERALLY RECOGNIZED TRIBAL RESERVATION OR INDIAN COUNTRY THAT YOU CLAIM AS YOUR DOMICILE (Include the name of the State the reservation is located within)	
7. I CERTIFY THAT I ANTICIPATE MEETING THE TWO CONDITIONS NECESSARY TO BE EXEMPT FROM WITHHOLDING FOR THE CALENDAR YEAR _____. I ALSO DECLARE THAT I WILL IMMEDIATELY NOTIFY THE FINANCE OFFICER OF ANY CHANGES THAT AFFECT MY WITHHOLDING STATUS.	
8. SIGNATURE OF APPLICANT	9. DATE (YYYYMMDD)

## INSTRUCTIONS

Completing this certificate allows you to claim exemption from State income tax withholding on your military compensation if you satisfy the following tests:

1. You claim as your State of legal residency/domicile a federally recognized tribal reservation or Indian Country.
2. You are an enrolled member of that federally recognized Native American tribe.

If you satisfy these conditions, the Soldiers' and Sailors' Civil Relief Act provides that your tax home remains on the reservation/in Indian country. Consequently, you may stop State income tax withholding on your military compensation.

If you have any doubt with regard to your State of legal residence/domicile, you are advised to see your Legal Assistance Officer (JAG representative) for advice prior to completing this form.

**Effective date of exemption election.** Withholding of State income tax will stop the month after the month in which you file this certificate. DFAS cannot make retroactive adjustments.

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## **APPENDIX F: Tables on Pay and Withholding, 1977-2007**



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**Military Pay by Grade and Years of Experience, Monthly for 1977-2007**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
	Monthly Pay					
1977	\$374.40	\$417.30	\$433.20	\$475.80	\$510.30	\$594.60
1978	\$397.50	\$443.10	\$460.20	\$505.20	\$541.80	\$631.50
1979	\$419.40	\$467.40	\$485.40	\$533.10	\$571.50	\$666.30
1980	\$448.80	\$500.10	\$519.60	\$570.60	\$611.70	\$713.10
1981	\$501.30	\$558.60	\$580.50	\$637.50	\$683.40	\$796.50
1982	\$551.40	\$618.30	\$642.60	\$720.30	\$796.20	\$927.90
1983	\$573.50	\$642.90	\$668.40	\$749.10	\$828.00	\$965.10
1984	\$573.60	\$668.70	\$695.10	\$779.10	\$861.00	\$1,003.80
1985	\$573.60	\$695.40	\$723.00	\$810.30	\$895.50	\$1,044.00
1986	\$573.60	\$695.40	\$723.00	\$810.30	\$895.50	\$1,044.00
1987	\$608.40	\$738.00	\$766.80	\$859.50	\$950.10	\$1,107.60
1988	\$630.70	\$752.70	\$782.10	\$876.60	\$969.00	\$1,129.80
1989	\$646.20	\$783.60	\$814.20	\$912.60	\$1,008.60	\$1,176.00
1990	\$669.60	\$811.80	\$843.60	\$945.60	\$1,044.90	\$1,218.30
1991	\$697.20	\$845.10	\$878.10	\$984.30	\$1,087.80	\$1,268.40
1992	\$726.60	\$880.50	\$915.00	\$1,025.70	\$1,133.40	\$1,321.80
1993	\$753.60	\$913.20	\$948.90	\$1,063.80	\$1,175.40	\$1,370.70
1994	\$770.10	\$933.30	\$969.90	\$1,087.20	\$1,201.20	\$1,401.00
1995	\$790.20	\$957.60	\$995.10	\$1,115.40	\$1,232.40	\$1,437.30
1996	\$809.10	\$980.70	\$1,013.70	\$1,142.10	\$1,262.10	\$1,471.80
1997	\$833.40	\$1,010.10	\$1,049.70	\$1,175.30	\$1,299.90	\$1,515.90
1998	\$856.80	\$1,038.30	\$1,079.10	\$1,209.30	\$1,336.20	\$1,558.20
1999	\$887.70	\$1,075.80	\$1,117.80	\$1,252.80	\$1,384.20	\$1,614.30
2000	\$930.30	\$1,127.40	\$1,171.50	\$1,312.80	\$1,450.50	\$1,691.70
2001	\$964.80	\$1,169.10	\$1,214.70	\$1,423.80	\$1,549.20	\$1,777.80
2002	\$1,022.70	\$1,239.30	\$1,303.50	\$1,517.70	\$1,665.30	\$1,912.80
2003	\$1,064.70	\$1,290.00	\$1,356.90	\$1,579.80	\$1,733.70	\$2,037.00
2004	\$1,104.00	\$1,337.70	\$1,407.00	\$1,638.30	\$1,813.50	\$2,130.60
2005	\$1,142.70	\$1,384.50	\$1,456.20	\$1,695.60	\$1,877.10	\$2,205.30
2006	\$1,178.10	\$1,427.40	\$1,501.30	\$1,748.10	\$1,935.30	\$2,273.70
2007	\$1,301.40	\$1,458.90	\$1,534.20	\$1,786.50	\$1,977.90	\$2,323.80

**Military Pay by Grade and Years of Experience, Annually for 1977-2007**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
	Annual Pay					
1977	\$4,492.80	\$5,007.60	\$5,198.40	\$5,709.60	\$6,123.60	\$7,135.20
1978	\$4,770.00	\$5,317.20	\$5,522.40	\$6,062.40	\$6,501.60	\$7,578.00
1979	\$5,032.80	\$5,608.80	\$5,824.80	\$6,397.20	\$6,858.00	\$7,995.60
1980	\$5,385.60	\$6,001.20	\$6,235.20	\$6,847.20	\$7,340.40	\$8,557.20
1981	\$6,015.60	\$6,703.20	\$6,966.00	\$7,650.00	\$8,200.80	\$9,558.00
1982	\$6,616.80	\$7,419.60	\$7,711.20	\$8,643.60	\$9,554.40	\$11,134.80
1983	\$6,882.00	\$7,714.80	\$8,020.80	\$8,989.20	\$9,936.00	\$11,581.20
1984	\$6,883.20	\$8,024.40	\$8,341.20	\$9,349.20	\$10,332.00	\$12,045.60
1985	\$6,883.20	\$8,344.80	\$8,676.00	\$9,723.60	\$10,746.00	\$12,528.00
1986	\$6,883.20	\$8,344.80	\$8,676.00	\$9,723.60	\$10,746.00	\$12,528.00
1987	\$7,300.80	\$8,856.00	\$9,201.60	\$10,314.00	\$11,401.20	\$13,291.20
1988	\$7,568.40	\$9,032.40	\$9,385.20	\$10,519.20	\$11,628.00	\$13,557.60
1989	\$7,754.40	\$9,403.20	\$9,770.40	\$10,951.20	\$12,103.20	\$14,112.00
1990	\$8,035.20	\$9,741.60	\$10,123.20	\$11,347.20	\$12,538.80	\$14,619.60
1991	\$8,366.40	\$10,141.20	\$10,537.20	\$11,811.60	\$13,053.60	\$15,220.80
1992	\$8,719.20	\$10,566.00	\$10,980.00	\$12,308.40	\$13,600.80	\$15,861.60
1993	\$9,043.20	\$10,958.40	\$11,386.80	\$12,765.60	\$14,104.80	\$16,448.40
1994	\$9,241.20	\$11,199.60	\$11,638.80	\$13,046.40	\$14,414.40	\$16,812.00
1995	\$9,482.40	\$11,491.20	\$11,941.20	\$13,384.80	\$14,788.80	\$17,247.60
1996	\$9,709.20	\$11,768.40	\$12,164.40	\$13,705.20	\$15,145.20	\$17,661.60
1997	\$10,000.80	\$12,121.20	\$12,596.40	\$14,103.60	\$15,598.80	\$18,190.80
1998	\$10,281.60	\$12,459.60	\$12,949.20	\$14,511.60	\$16,034.40	\$18,698.40
1999	\$10,652.40	\$12,909.60	\$13,413.60	\$15,033.60	\$16,610.40	\$19,371.60
2000	\$11,163.60	\$13,528.80	\$14,058.00	\$15,753.60	\$17,406.00	\$20,300.40
2001	\$11,577.60	\$14,029.20	\$14,576.40	\$17,085.60	\$18,590.40	\$21,333.60
2002	\$12,272.40	\$14,871.60	\$15,642.00	\$18,212.40	\$19,983.60	\$22,953.60
2003	\$12,776.40	\$15,480.00	\$16,282.80	\$18,957.60	\$20,804.40	\$24,444.00
2004	\$13,248.00	\$16,052.40	\$16,884.00	\$19,659.60	\$21,762.00	\$25,567.20
2005	\$13,712.40	\$16,614.00	\$17,474.40	\$20,347.20	\$22,525.20	\$26,463.60
2006	\$14,137.20	\$17,128.80	\$18,015.60	\$20,977.20	\$23,223.60	\$27,284.40
2007	\$15,616.80	\$17,506.80	\$18,410.40	\$21,438.00	\$23,734.80	\$27,885.60

**New Mexico Income Tax Withholding on Single Individuals at  
Each Pay/Experience Level, Monthly for 1985-2007<sup>1</sup>**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
Monthly Withholding for Single Filer						
1985	\$1.99	\$2.84	\$3.04	\$4.19	\$5.38	\$7.46
1986	\$1.94	\$2.80	\$2.99	\$4.09	\$5.29	\$7.37
1987	\$2.19	\$3.09	\$3.49	\$4.78	\$6.05	\$8.26
1988	\$4.01	\$6.20	\$6.73	\$8.85	\$11.62	\$16.44
1989	\$4.29	\$6.76	\$7.31	\$9.93	\$12.81	\$17.83
1990	\$4.55	\$7.11	\$7.68	\$10.65	\$13.63	\$18.83
1991	\$4.23	\$6.89	\$7.48	\$10.44	\$13.54	\$18.96
1992	\$4.76	\$7.53	\$8.36	\$11.68	\$14.91	\$20.56
1993	\$4.72	\$7.59	\$8.51	\$11.95	\$15.30	\$21.36
1994	\$4.78	\$7.72	\$8.77	\$12.29	\$15.71	\$22.17
1995	\$4.57	\$7.42	\$8.29	\$12.14	\$15.89	\$22.44
1996	\$4.89	\$7.83	\$8.89	\$13.00	\$16.84	\$24.08
1997	\$4.89	\$7.99	\$9.25	\$13.27	\$17.26	\$24.95
1998	\$4.93	\$8.23	\$9.53	\$13.70	\$17.76	\$25.96
1999	\$5.25	\$9.00	\$10.34	\$14.66	\$18.87	\$28.02
2000	\$5.83	\$10.38	\$11.80	\$16.32	\$20.72	\$31.27
2001	\$6.21	\$11.32	\$12.78	\$19.47	\$23.99	\$34.73
2002	\$6.82	\$12.91	\$14.96	\$21.82	\$28.47	\$40.11
2003	\$6.97	\$13.46	\$15.61	\$22.89	\$30.12	\$45.00
2004	\$7.71	\$15.13	\$17.35	\$25.84	\$34.08	\$50.88
2005	\$7.74	\$15.43	\$17.73	\$26.73	\$35.26	\$53.12
2006	\$8.17	\$16.14	\$18.51	\$28.23	\$37.03	\$54.36
2007	\$11.29	\$16.33	\$18.74	\$28.88	\$37.87	\$55.65

<sup>1</sup> New Mexico income tax withholding tables are unavailable prior to 1985.

**New Mexico Income Tax Withholding on Single Individuals at  
Each Pay/Experience Level, Annually for 1985-2007<sup>1</sup>**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
Annual Withholding for Single Filer						
1985	\$23.88	\$34.11	\$36.43	\$50.25	\$64.56	\$89.51
1986	\$23.32	\$33.55	\$35.87	\$49.13	\$63.44	\$88.39
1987	\$26.24	\$37.13	\$41.82	\$57.40	\$72.62	\$99.08
1988	\$48.10	\$74.46	\$80.81	\$106.18	\$139.44	\$197.33
1989	\$51.45	\$81.13	\$87.74	\$119.14	\$153.70	\$213.96
1990	\$54.56	\$85.28	\$92.15	\$127.78	\$163.52	\$225.95
1991	\$50.73	\$82.68	\$89.80	\$125.27	\$162.53	\$227.54
1992	\$57.08	\$90.32	\$100.32	\$140.17	\$178.94	\$246.77
1993	\$56.65	\$91.12	\$102.08	\$143.45	\$183.62	\$256.27
1994	\$57.34	\$92.59	\$105.21	\$147.43	\$188.47	\$265.98
1995	\$54.85	\$89.00	\$99.53	\$145.73	\$190.66	\$269.34
1996	\$58.70	\$94.00	\$106.67	\$155.98	\$202.06	\$288.96
1997	\$58.63	\$95.82	\$111.03	\$159.26	\$207.11	\$299.36
1998	\$59.19	\$98.72	\$114.38	\$164.38	\$213.11	\$311.56
1999	\$62.97	\$108.00	\$124.12	\$175.96	\$226.42	\$336.24
2000	\$69.96	\$124.61	\$141.54	\$195.80	\$248.68	\$375.19
2001	\$74.49	\$135.89	\$153.40	\$233.69	\$287.87	\$416.80
2002	\$81.88	\$154.90	\$179.56	\$261.81	\$341.69	\$481.28
2003	\$83.65	\$161.58	\$187.27	\$274.67	\$361.47	\$540.00
2004	\$92.55	\$181.55	\$208.17	\$310.11	\$408.92	\$610.51
2005	\$92.83	\$185.19	\$212.73	\$320.81	\$423.18	\$637.42
2006	\$98.00	\$193.73	\$222.10	\$338.76	\$444.34	\$652.26
2007	\$135.49	\$195.97	\$224.88	\$346.51	\$454.46	\$667.80

<sup>1</sup> New Mexico income tax withholding tables are unavailable prior to 1985.

**New Mexico Income Tax Withholding on Married Individuals with Two Dependents  
at Each Pay/Experience Level, Monthly for 1985-2007<sup>1</sup>**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
<b>Monthly Withholding for Joint Filer with Two Dependents</b>						
1985	\$0.00	\$0.00	\$1.06	\$1.58	\$2.09	\$2.98
1986	\$0.00	\$0.00	\$0.00	\$1.50	\$2.01	\$2.90
1987	\$0.00	\$1.07	\$1.24	\$1.80	\$2.34	\$3.62
1988	\$0.00	\$0.00	\$0.00	\$1.43	\$3.65	\$7.51
1989	\$0.00	\$0.00	\$0.00	\$2.29	\$4.60	\$8.62
1990	\$0.00	\$0.00	\$0.00	\$2.65	\$5.04	\$9.20
1991	\$0.00	\$0.00	\$0.00	\$0.00	\$1.80	\$6.14
1992	\$0.00	\$0.00	\$0.00	\$0.00	\$2.90	\$7.42
1993	\$0.00	\$0.00	\$0.00	\$0.00	\$2.42	\$7.10
1994	\$0.00	\$0.00	\$0.00	\$0.00	\$2.33	\$7.12
1995	\$0.00	\$0.00	\$0.00	\$0.00	\$2.00	\$6.50
1996	\$0.00	\$0.00	\$0.00	\$0.00	\$2.65	\$7.26
1997	\$0.00	\$0.00	\$0.00	\$0.00	\$1.77	\$5.44
1998	\$0.00	\$0.00	\$0.00	\$0.00	\$1.68	\$5.45
1999	\$0.00	\$0.00	\$0.00	\$0.00	\$1.99	\$5.90
2000	\$0.00	\$0.00	\$0.00	\$0.00	\$2.77	\$6.87
2001	\$0.00	\$0.00	\$0.00	\$1.90	\$4.03	\$7.91
2002	\$0.00	\$0.00	\$0.00	\$2.70	\$5.21	\$9.42
2003	\$0.00	\$0.00	\$0.00	\$0.00	\$2.85	\$8.00
2004	\$0.00	\$0.00	\$0.00	\$1.42	\$4.40	\$9.79
2005	\$0.00	\$0.00	\$0.00	\$0.00	\$3.92	\$9.50
2006	\$0.00	\$0.00	\$0.00	\$0.00	\$4.07	\$9.83
2007	\$0.00	\$0.00	\$0.00	\$0.00	\$3.81	\$9.69

<sup>1</sup> New Mexico income tax withholding tables are unavailable prior to 1985.

**New Mexico Income Tax Withholding on Married Individuals with Two Dependents  
at Each Pay/Experience Level, Annually for 1985-2007<sup>1</sup>**

Year	Pay Grade/(Experience)					
	E1 (< 4 mos.)	E2 (< 2 yrs.)	E3 (< 2 yrs.)	E4 (> 2 yrs.)	E5 (> 2 yrs.)	E5 (> 6 yrs.)
Annual Withholding for Joint Filer with Two Dependents						
1985	\$0.00	\$0.00	\$12.70	\$18.98	\$25.12	\$35.81
1986	\$0.00	\$0.00	\$0.00	\$18.02	\$24.16	\$34.85
1987	\$0.00	\$12.82	\$14.89	\$21.56	\$28.09	\$43.43
1988	\$0.00	\$0.00	\$0.00	\$17.16	\$43.78	\$90.09
1989	\$0.00	\$0.00	\$0.00	\$27.53	\$55.18	\$103.39
1990	\$0.00	\$0.00	\$0.00	\$31.85	\$60.45	\$110.39
1991	\$0.00	\$0.00	\$0.00	\$0.00	\$21.63	\$73.65
1992	\$0.00	\$0.00	\$0.00	\$0.00	\$34.77	\$89.03
1993	\$0.00	\$0.00	\$0.00	\$0.00	\$29.01	\$85.25
1994	\$0.00	\$0.00	\$0.00	\$0.00	\$27.90	\$85.44
1995	\$0.00	\$0.00	\$0.00	\$0.00	\$23.95	\$78.04
1996	\$0.00	\$0.00	\$0.00	\$0.00	\$31.79	\$87.15
1997	\$0.00	\$0.00	\$0.00	\$0.00	\$21.20	\$65.26
1998	\$0.00	\$0.00	\$0.00	\$0.00	\$20.17	\$65.46
1999	\$0.00	\$0.00	\$0.00	\$0.00	\$23.91	\$70.85
2000	\$0.00	\$0.00	\$0.00	\$0.00	\$33.22	\$82.42
2001	\$0.00	\$0.00	\$0.00	\$22.74	\$48.32	\$94.96
2002	\$0.00	\$0.00	\$0.00	\$32.44	\$62.55	\$113.04
2003	\$0.00	\$0.00	\$0.00	\$0.00	\$34.15	\$96.02
2004	\$0.00	\$0.00	\$0.00	\$17.06	\$52.80	\$117.49
2005	\$0.00	\$0.00	\$0.00	\$0.00	\$47.08	\$114.03
2006	\$0.00	\$0.00	\$0.00	\$0.00	\$48.88	\$117.92
2007	\$0.00	\$0.00	\$0.00	\$0.00	\$45.68	\$116.24

<sup>1</sup> New Mexico income tax withholding tables are unavailable prior to 1985.

**APPENDIX G: April 30, 2007 Stipulated Order and Decision  
Felipe vs. Taxation and Revenue Department**



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FIRST JUDICIAL DISTRICT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO

ENDORSED AS  
First Judicial District Court

APR 30 2007

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268

LLOYD FELIPE, OLIN J. MARTINEZ,  
RALPH PAYTIAMO, JOSEPH EDWARD HUNT,  
WILBERT EDWARD HUNT, DARRELL CHINO,  
as Personal Representative of the Estate of DERRICK  
J. CHINO, KEN TILLER, HARRY D. EARLY,  
EDWARD R. VALLEY, CLAUDIA MARTINEZ,  
as Personal Representative of the estate of RAYNARD  
THOMAS MARTINEZ, LLOYD BRIAN SHUTIVA,  
LEWIS BIRD, and CLYDE B. TENORIO, *et al.*,

Plaintiffs,

vs.

D-101-CV-200401421

TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO,

Defendant.

STIPULATED DECISION AND ORDER

The undersigned attorneys of record hereby consent to the following DECISION  
AND ORDER:

THE COURT, having heard the arguments of both parties and being fully  
advised of the premises,

FINDS:

1. The following 11 Plaintiffs, hereinafter referred to as the "Valid Claimants",  
filed complete, valid refund claims by the later of (1) December 31 of the year three years

after they separated from military service ; or (2) December 31 of the year three years after the year in which New Mexico income tax was withheld from their military pay:

- (1) Galen Leon ;
- (2) Calvin Benally;
- (3) Rolando Chee ;
- (4) Marvin Frank ;
- (5) Judy Gilmore ;
- (6) Johnell Gould ;
- (7) Eric Harrison;
- (8) Henderson Lopez;
- (9) Leonard Pablo Jr. ;
- (10) Daryl Smiley; and
- (11) Bruce Willie.

2. The social security numbers and dates of military service of the Valid Claimants are set forth below:

Galen Leon –	- service dates of 2-18-1992 to present ;
Calvin Benally –	- service dates of 7-24-2000 to 7-24-2004;
Rolando Chee –	- service dates of 5-22-00 to 5-21-2004
Marvin Frank –	- service dates of 8-16-00 to 8-15-04;
Judy Gilmore –	- service dates of 1-8-02 to 2-7-04;
Johnell Gould –	- service dates of 7-31-97 to 4-11-04;
Eric Harrison –	- service dates of 8-7-01 to 8-6-04;
Henderson Lopez –	- service dates of 3-20-01 to 3-19-05;
Leonard Pablo Jr. –	- service dates of 2-13-01 to 2-12-04;
Daryl Smiley –	- service dates of 7-21-97 to 7-20-01; and
Bruce Willie –	- service dates of 10-89 to 4-05.

3. The total amount of New Mexico state income tax withheld from each of the Valid Claimants is set forth below:

Galen Leon - \$5,294.24;  
Calvin Benally -\$1,828;  
Rolando Chee -\$1,326;  
Marvin Frank -\$1,828;

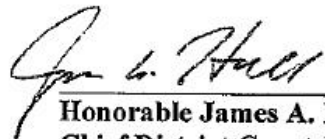
Judy Gilmore -\$856;  
Johnell Gould -\$3,080;  
Eric Harrison -\$1,336;  
Henderson Lopez -\$1,828;  
Leonard Pablo Jr. \$1,336;  
Daryl Smiley -\$1,828; and  
Bruce Willie -\$7,500

. The remaining Plaintiffs did not file complete refund claims by the later of (1) December 31 of the year three years after they separated from military service ; or (2) December 31 of the year three years after the year in which New Mexico income tax was withheld from their military pay; and the Court therefore

**CONCLUDES:**

1. This court lacks jurisdiction to adjudicate the claims of all of the plaintiffs who did not file valid, timely refund claims.
2. Members of the Plaintiffs' putative class are limited to taxpayers who have filed valid, timely refund claims.
3. This action cannot be maintained as a class action because of lack of numerosity.
4. The claims of all Plaintiffs except the Valid Claimants are incomplete, and the three (3) year Statute of Limitations has now run on all of their claims; and it is hereby

1. **ORDERED**, that the New Mexico Department of Taxation and Revenue pay the aggregate amount of \$28,040.24 to the law firm of Bowles and Crowe, as refunds of New Mexico income tax, plus interest as provided by law, to be placed in that firm's Client Trust Account and disbursed to the Valid Claimants listed in paragraph 3 of this Court's Findings of Fact set forth above, each claimant to receive from said Client Trust Account the amount set forth opposite his or her name in said paragraph 3, less his or her allocable share of Bowles & Crowe's reasonable and lawful attorney fees in prosecuting this matter; and it is further
2. **ORDERED**, that after payment or setting aside of the disbursements described in the immediately preceding paragraph 1, Bowles and Crowe may pay to that firm their reasonable and lawful attorney fees in connection with this matter out of said Client Trust Account; and it is further
3. **ORDERED**, that the claims of all of the Plaintiffs in this action other than the Valid Claimants are hereby **DISMISSED WITH PREJUDICE**, and no further plaintiffs may join this action.

  
Honorable James A. Hall,  
Chief District Court Judge

**SUBMITTED:**

  
Jeffrey M. Loubet  
Spec. Asst. Atty. General

New Mexico Taxation and Revenue Dept.  
Legal Services Bureau  
P.O. Box 630  
Santa Fe, New Mexico 87509  
(505) 827-0776

**APPROVED:**



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Jason Bowles, Esq.  
Bowles & Crowe  
201 Third St. NW  
Suite 1370  
Albuquerque, N.M. 87125  
(505)217-2680  
FAX (505)217-2681

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## **APPENDIX H: Methodology for Estimating Withholding on Native American Veterans**



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## Methodology for Estimating Withholding on Native American Veterans

This appendix describes the methodology used to estimate the amount of New Mexico income taxes withheld from the military pay of Native American veterans. Because of the lack of detailed historical information, estimating the amount of withholding has required numerous assumptions. Therefore, two alternative withholding estimates based on two different sets of assumptions were made to reflect the uncertainty over certain key assumptions.

### Assumptions:

1. Native American population estimates are used to apportion Native Americans serving in the military to New Mexico, since no specific data is available on the number of Native Americans from New Mexico serving in the military. The first estimate assumes that the New Mexico Native American military population as a percent of the U. S. Native American military population is equivalent to the New Mexico Native American population as a percent of the U. S. Native American population. The alternative estimate increases this percent by 25%.
2. All active duty New Mexico Native Americans military personnel have the following combination of attributes:
  - a. Family status: single with no dependents or married with two children
  - b. Pay Grade and Years of Experience: E-1 (less than two), E-2 (less than two), E-3 (less than two), E-4 (over two), E-5 (half over two and half over 6)
3. Because single filers who have only one job are entitled to an additional withholding allowance, single filers claim two withholding allowances.
4. Married filers claim four withholding allowances. (Married filers who have two dependents and a spouse who works are entitled to four withholding allowances. Married filers who have one dependent and a spouse who does not work are also entitled to four allowances.)
5. In any given year, all Native Americans received the *average* monthly pay for those of their pay grade and experience level.
6. According to the 2000 Census, 60.4% of Native Americans in New Mexico were resident on tribal land. The first estimate assumes this percentage remains constant over all years and applies to Native Americans from New Mexico who served in the military. Because the Census information is not specific to Native Americans serving in the military, the alternative estimate assumes that 100% of New Mexico Native Americans enlisted in the military reside on their tribal land.
7. Because withholding tables are not available prior to 1985, withholding amounts for 1977-1984 were assumed to be equal to the withholding amounts estimated for 1985.
8. Data pertaining to the number of active duty enlisted Native Americans is not available prior to 1996. It was assumed that enlistment numbers for 1977-1995 are equivalent to those for 1996.
9. Information pertaining to the percent of Native Americans in pay grades E1 through E5 is only available for 2004-2006. These numbers were weighted to account for 100 percent of Native American in the military, and then averaged for the three available years. These averages were used for all years for which data is unavailable.
10. DOD publishes historical information regarding the percent of married and single active enlisted personnel for years 1977-2006. The first estimate assumes these percentages apply to all Native Americans in the military at all pay grade levels. In contrast, the alternative estimate assumes all Native Americans from New Mexico serving in the military are single.

### **Estimation process:**

For each year, an annual withholding amount is calculated for every combination of family status, pay grade, and experience level (see assumption #1 above). Annual withholding is multiplied by the estimated number of active duty New Mexico Native American military personnel characterized by the given set of attributes. The calculation process is described below, followed by an example.

### **Process for calculating withholding amount:**

Information and sources:

1. Average monthly military pay for each pay grade and experience level combination (source: Defense Finance and Accounting Service website: <http://www.dfas.mil/militarypay/2006militarypaytables/militarypaypriorrates.html> last accessed September 25, 2008).
2. Withholding allowance amount (source: New Mexico state wage withholding tax tables, 1985-2003. Published annually by TRD).
3. Number of withholding allowances (source: see assumptions #2 and #3 above).

Total adjustments (*totadj*) are calculated as the monthly withholding allowance amount (*whamt*) multiplied by the number of withholding allowances (*whnumber*), i.e.,

$$totadj = whamt * whnumber.$$

Adjusted monthly wages (*adjwage*) are equal to monthly wages (*wage*) less total adjustments (*totadj*), i.e.,

$$adjwage = wage - totadj.$$

Monthly New Mexico income tax withholding (*mowh*) is calculated using *adjwage* and the New Mexico state wage withholding tax tables, which list both a dollar amount to be withheld and the percent of the proportion of *adjwage* above a given threshold amount that is to be withheld. Monthly withholding is converted to annual withholding by multiplying *mowh* by 12.

### **Process for calculating the number of affected Native Americans:**

Information and sources:

1. Number of active duty North American Indians enlisted military personnel (source: DOD Personnel & Readiness Office. Population Representation in the Military Services report, 1996-2006. Available online: <http://www.defenselink.mil/prhome/>. Last accessed September 25, 2008.)
2. Native American population for US and NM (sources: Data for 1977-1989 was obtained from the US Census Bureau website, <http://www.census.gov/popest/estimates.php>. Data for 1990-2007 was obtained from various University of New Mexico Data Bank websites: <http://www.unm.edu/~bber/demo/2007table4.xls>, <http://www.unm.edu/~bber/demo/coestchar.htm>, and <http://www.unm.edu/~bber/demo/cntypop.htm>. Last accessed September 25, 2008.)
3. Percent of Native Americans in pay grades E1, E2, E3, E4, and E5 (source: DOD Personnel & Readiness Office, Population Representation in the Military Services report, 2004-2006. Available online: <http://www.defenselink.mil/prhome/>. Last accessed September 25, 2008.)
4. Percent of military members married (source: DOD Personnel & Readiness Office, Population Representation in the Military Services 2006 report.

[http://www.defenselink.mil/prhome/PopRep\\_FY06/appendixd/d\\_14.htm](http://www.defenselink.mil/prhome/PopRep_FY06/appendixd/d_14.htm). Last accessed September 25, 2008.)

5. Percent of New Mexico Native Americans resident on tribal lands (source: 2000 Census, as compiled by the Data Bank of the Bureau of Business and Economic Research at the University of New Mexico)

To estimate the number of New Mexico Native Americans enlisted in the military (*NMNA<sub>mil</sub>*), the New Mexico Native American population (*NMNA*) is divided by the U.S. Native American population (*USNA*), and this percent is multiplied by the total number of Native Americans enlisted in the military (*USNA<sub>mil</sub>*):

$$NMNA_{mil} = (NMNA/USNA)*USNA_{mil}.$$

(The alternative estimate multiplies *NMNA<sub>mil</sub>* by 1.25.) Information regarding the percent of Native Americans in grades E1 through E5 was subsequently used to estimate the number of New Mexico Native American military members in each pay grade. To estimate the percent of married and single Native Americans in each pay grade, the number of individuals in a given pay grade was multiplied by the percent of enlisted military personnel who were married in a given year. (The alternative estimate assumes all enlisted New Mexico Native Americans are single.) Finally, only those Native Americans who were resident on their tribal land were exempt from withholding, so the number of eligible Native Americans was reduced. According to calculations done by the University of New Mexico Data Bank using information from the 2000 Census, 60.4% of New Mexico Native Americans were resident on tribal land in 2000. This percentage was used to make the reduction for all years, 1977-2004. (The alternative estimate assumes all New Mexico Native Americans were resident on their tribal land.)

This process provided estimates of the number of enlisted active duty Native Americans from New Mexico who were resident on their tribal lands and characterized by a given pay grade/experience level and marital status.

### **Example:**

Consider an individual who attained a pay grade of E-4 and (by assumption) had more than two years of experience in 2000. If the individual is single and has no dependents, they would claim two withholding allowances. The estimated 2000 New Mexico income tax withholding amount would be calculated as follows. Monthly wages were \$1,312.80. The monthly withholding allowance (*whamt*) was \$229.17, so total adjustments (*totadj*) were \$458.34. Subtracting *totadj* from monthly wages (*wage*) yields monthly wages less adjustments (*adjwage*) of \$854.46. For *adjwage* values between \$588 and \$1,046, the 2000 New Mexico state wage withholding tax table lists the monthly State income tax withholding (*mowh*) for a single filer as:

$$\begin{aligned} mowh &= \$7.79 + 3.2\%*(wage - totadj - \$588) \\ &= \$7.79 + 3.2\%*(1312.80 - 458.34 - 588) \\ &= \$7.79 + 8.53 \\ &= \$16.32 \end{aligned}$$

Multiplying by 12 converts the monthly withholding to an annual withholding amount:

$$\$16.32*12 = \$195.84$$

This annual withholding amount is multiplied by the number of Native Americans from New Mexico who were resident on their tribal land who in 2000 were single and categorized as an E-4 with more than two years of experience. In 2000 there were 9,935 Native Americans enlisted in the military, and 6.68 percent (178,665) of the United States' 2,673,624 Native Americans lived in New Mexico.

For the first estimate, 6.68% is multiplied by 9,935, which indicates that 664 of the military's enlisted Native Americans were from New Mexico. An estimated 60.4% of these individuals (401) were resident on tribal land and were therefore exempt from New Mexico income tax. According to DOD, an estimated 50.28% (202) of these 401 individuals were single. In 2000, an estimated 28% of Native Americans were in pay grade E-4, and thus 56 ( $=28\% * 202$ ) of the enlisted Native Americans from New Mexico were single and in pay grade E-4. Total New Mexico income tax withholdings in the year 2000 from the military pay of enlisted active duty New Mexico Native Americans characterized as single, resident on tribal land, and of the E-4 pay grade would therefore be \$10,967.04 ( $=\$195.84*56$ ).

For the alternative estimate, Native Americans from New Mexico were assumed to comprise a greater portion of the military's Native Americans. Specifically, Native Americans from New Mexico were assumed to comprise  $6.68\% * 1.25$ , or 8.35% of the military's Native American population. Multiplying 8.35% by 9,935 indicates that 830 of the military's enlisted Native Americans were from New Mexico. All 830 were assumed to be resident on tribal land and to be single. Of these 830 individuals, 28 percent (232) were in pay grade E-4. Total New Mexico income tax withholdings in the year 2000 from the military pay of enlisted active duty New Mexico Native Americans characterized as single, resident on tribal land, and of the E-4 pay grade would therefore be \$45,434.88 ( $=\$195.84*232$ ).

## **APPENDIX I: DD Form 214**

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**ANY ALTERATIONS IN SHADED AREAS  
RENDER FORM VOID**

1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NUMBER	
4a. GRADE, RATE OR RANK		b. PAY GRADE		5. DATE OF BIRTH (YYYYMMDD)	
				6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD)	
7a. PLACE OF ENTRY INTO ACTIVE DUTY			b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)		
8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND			b. STATION WHERE SEPARATED		
9. COMMAND TO WHICH TRANSFERRED				10. SGLI COVERAGE <input type="checkbox"/> NONE AMOUNT: \$	
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)			12. RECORD OF SERVICE		
			a. DATE ENTERED AD THIS PERIOD		
			b. SEPARATION DATE THIS PERIOD		
			c. NET ACTIVE SERVICE THIS PERIOD		
			d. TOTAL PRIOR ACTIVE SERVICE		
			e. TOTAL PRIOR INACTIVE SERVICE		
			f. FOREIGN SERVICE		
			g. SEA SERVICE		
			h. EFFECTIVE DATE OF PAY GRADE		
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)			14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)		
15a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM				YES	NO
b. HIGH SCHOOL GRADUATE OR EQUIVALENT				YES	NO
16. DAYS ACCRUED LEAVE PAID		17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION		YES	NO
18. REMARKS					
<p>The information contained herein is subject to computer matching within the Department of Defense or with any other affected Federal or non-Federal agency for verification purposes and to determine eligibility for, and/or continued compliance with, the requirements of a Federal benefit program.</p>					
19a. MAILING ADDRESS AFTER SEPARATION (Include ZIP Code)			b. NEAREST RELATIVE (Name and address - include ZIP Code)		
20. MEMBER REQUESTS COPY 9 BE SENT TO DIRECTOR OF VETERANS AFFAIRS				YES	NO
21. SIGNATURE OF MEMBER BEING SEPARATED		22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)			

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (include vignettes)	
25. SEPARATION AUTHORITY	26. SEPARATION CODE	27. REENTRY CODE
28. NARRATIVE REASON FOR SEPARATION		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD)		30. MEMBER REQUESTS COPY 4 (include)

**MEMBER - 4**